Affirmed by a divided Court
14-504
Judge Davis

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~351~~ 150

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, NEW YORK, PLAINTIFF IN ERROR,

vs.

VINCENT HAMILTON AND JOSIAH D. COOK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED DECEMBER 7, 1870.

Dec. 1871

SUPREME COURT OF THE UNITED STATES.

No. 351.

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, NEW YORK, PLAINTIFF IN ERROR,

vs.

VINCENT HAMILTON AND JOSIAH D. COOK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

INDEX.

	Original.	Print.
Writ of error	*a*	1
Citation and service	*b*	1
Copy of bond	*c*	2
Transcript from Lucas County common pleas	1	3
Declaration	2	4
Indorsement for costs	25	15
Entry extending time for filing plea	25	15
Entry extending time for filing plea, and continuance	25	15
Plea	25	16
Continuance	26	16
Trial by jury	26	16
Trial continued and concluded	26	16
Motion for new trial	27	17
Bill of exceptions	27	17
Judgment	55	31
Clerk's certificate	57	31

a Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the sixth circuit and northern district of Ohio, greeting:

Because, in the record and proceedings, and also in the rendition of a judgment in a plea, which is in the said circuit court before you, between Vincent Hamilton & Josiah D. Cook, plaintiffs, and The Phœnix Insurance Company of Brooklyn, New York, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, on the first Monday, in the month of December next, in the said Supreme Court, then and there to be held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 30th day of December, in the year of our Lord one thousand eight hundred and sixty-nine, and of the independence of the United States of America the ninety-fourth.

Attest:

[SEAL.] EARL BILL, *Clerk.*

(Indorsed:) The Phœnix Insurance Company of Brooklyn, New York, v. Vincent Hamilton & Josiah D. Cook. Writ of error. Filed in the clerk's office of the circuit court of the United States for the northern district of Ohio, December 30th, 1869. Earl Bill, clerk. R. P. Ranney, att'y for pl'ff in error.

NORTHERN DISTRICT OF OHIO, *ss:*

The execution of the within writ of error will appear by the transcript of the record of the within-mentioned judgment and proceedings, duly authenticated, with the citation issued to the said defnda n ts in error, together with the assignment of errors by said plainiff i n error, and a prayer for reversal. Also a copy of the bond given by said plaintiff in error, on the signing of said citation, all of which are hereto annexed and returned herewith.

Witness my official signature and the seal of the circuit court of the United States for said northern district of Ohio, at Cleveland, this 21st day of January, A. D. 1870.

[SEAL.] EARL BILL,
Clerk of the Circuit Court of the United States for said District.

b THE UNITED STATES OF AMERICA,
Supreme Court of the United States:

To Vincent Hamilton & Josiah D. Cook, greeting:

Whereas The Phœnix Insurance Company of Brooklyn, New York,

has obtained the allowance of our writ of error to the circuit court of the United States within and for the northern district of Ohio directed, to remove into the said Supreme Court, to be holden at the city of Washington, on the first Monday in the month of December next, the record of a certain plaint, process, proceedings, and judgment in an action of assumpsit, wherein you, the said Vincent Hamilton and Josiah D. Cook, in that action lately recovered against the said The Phœnix Insurance Company, of Brooklyn, New York, and costs, as by the said record in the said circuit court now remaining appears, in which said record and proceedings, and also in the rendition of the judgment thereupon, manifest error hath intervened, as by the said The Phœnix Insurance Company of Brooklyn, New York, we are informed, and our said writ of error granted, issued and allowed as aforesaid, for the purpose of correcting the errors aforesaid alledged, if any there be, you are, therefore, hereby commanded and cited, to be and appear before the judges of the said Supreme Court, at the city of Washington, at the next term of said court, to be holden on the first Monday, in the month of December next, to have the errors aforesaid corrected, and the judgment of our said Supreme Court thereupon.

Witness the Honorable Salmon P. Chase, Chief Justice of the United States of America, this 30th day of December, in the year of our Lord one thousand eight hundred and sixty-nine, and of the independence of the United States of America the ninety-fourth.

[SEAL.] C. T. SHERMAN,
U. S. Dist. Judge, and one of Judges of said Circuit Court.

NORTHERN DISTRICT OF OHIO, *ss:*

We hereby acknowledge service of a copy of the within citation.
Dec. 30, 1869.

VINCENT HAMILTON &
JOSIAH D. COOK.
By BISSEL & WAITE,
Their Att'ys.

(Indorsed:) Phœnix Insurance Company of Brooklyn, New York, vs. Vincent Hamilton & Josiah D. Cook. Citation in error. Filed in the clerk's office of the circuit court of the United States for the northern district of Ohio. Dec. 30, 1869. Earl Bill, clerk.

c THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

In the circuit court of the United States for the sixth judicial circuit and northern district of Ohio.

VINCENT HAMILTON AND JOSIAH D. COOK
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, NEW YORK. } In assumpsit.

Know all men by these presents that we, The Phœnix Insurance Company of Brooklyn, New York, as principal, and Sage S. Coe and Charles W. Coe, as sureties, are held and firmly bound unto Vincent Hamilton and Josiah D. Cook, in the sum of fifteen thousand dollars for the payment whereof, well and truly to be made to the said Vincent Hamilton

and Josiah D. Cook, we do hereby bind ourselves, our heirs, executors, and administrators jointly and severally, firmly by these presents, sealed with our seals, and dated this 30th day of December, A. D. 1869.

The condition of the above obligation is such, that whereas the above-named The Phœnix Insurance Company of Brooklyn, New York, have sued out a writ of error to the Supreme Court of the United States, to reverse the judgment rendered by the said circuit court of the United States, at the September term, A. D. 1869, to wit, on the 28th day of December, 1869, in the above-entitled cause against the said The Phœnix Insurance Company of Brooklyn, New York, and in favor of the said Vincent Hamilton and Josiah D. Cook, for the sum of nine thousand nine hundred and seventy-one dollars and sixteen damages and for the costs of said suit.

Now, therefore, if the said The Phœnix Insurance Company of Brooklyn, New York, shall prosecute its said writ of error to effect, and shall answer all damages and costs which may be adjudged against it, if it fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

The Phœnix Insurance Co. of Brooklin, New York,
By R. P. RANNEY, *Their Att'y.* [SEAL.]
S. S. COE. [SEAL.]
CHARLES W. COE. [SEAL.]

Sealed & delivered in presence of—

I am satisfied that the surety in the above bond is good for the amount thereof, and I hereby approve the same.

C. T. SHERMAN, *U. S. Judge.*

d NORTHERN DISTRICT OF OHIO, *ss:*

It is hereby certified that the foregoing is a true copy of the original bond in error filed in this cause, and now remaining in the clerk's office of the circuit court of the United States for the northern district of Ohio.

Witness my official signature, and the seal of said circuit court, at Cleveland, in said district this 21st day of Jan'y, A. D. 1870.

[SEAL.] EARL BILL,
Clerk of said Circuit Court.

(Indorsed:) 1807. Vincent Hamilton & Josiah D. Cook vs. The Phœnix Insurance Co. Bond in error. Filed December 30, 1869. Earl Bill, clerk. Copy.

1 September term, A. D. 1869.

At a stated term of the circuit court of the United States for the northern district of Ohio, begun and held at the city of Cleveland, in said district, on the first Tuesday of September, being the seventh day of that month, in the year of our Lord one thousand eight hundred and sixty-nine, and of the independence of the United States of America the ninety-fourth—

Present, the Honorable Charles T. Sherman, district judge—

Among the proceedings then and there had were the following, to wit:

VINCENT HAMILTON ET AL.
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, New York.
} No. 1897. In assumpsit.

Be it remembered that heretofore, to wit, on the 21st day of December, A. D. 1868, the following transcript of the proceedings of the court of common pleas, of Lucas County, Ohio, was duly filed herein in the clerk's office of said circuit court, by the said Phœnix Insurance Company of Brooklyn, New York, which said transcript is in the words and figures following, to wit:

Transcript.

THE STATE OF OHIO,
Lucas County, ss:

To the sheriff of Lucas County:

You are hereby commanded to notify The Phœnix Insurance Company of Brooklyn, New York, that it has been sued by Vincent Hamilton & Josiah D. Cook, in the court of common pleas of Lucas County,
and that unless it answer' by the 18th day of July, A. D. 1868,
2 the petition of the said plaintiff against it filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 29th day of June, A. D. 1868.

Witness Victor Keen, clerk of said court and the seal thereof, at Toledo, this 20th day of June, A. D. 1868.

[SEAL.] VICTOR KEEN, *Clerk*,
By M. A. SEBLEY,
Deputy Clerk.

Summons in action for money only; am't claimed, $9,815 63, with interest from 9th day of April, A. D. 1868.

THE STATE OF OHIO,
Lucas County, ss:

Received June 20th, 1868. In obedience to the command of this summons, I, on the 24th day of June, 1868, summoned the within-named defendant by delivering a true copy of this writ to Walter C. Scott, the chief officer of said company in this county.

H. D. KINGSBURY, *Sheriff.*
By M. C. O'CONNOR, *Dep.*

THE STATE OF OHIO,
Lucas County, ss:

I, Victor Keen, clerk of the court of common pleas of Lucas County, Ohio, hereby certify that the above and within is a full and true copy of the original summons with all the endorsements and sheriff's return thereon written, in the action of Vincint Hamilton et al., plaintiffs, and The Phœnix Fire Insurance Company of Brooklyn, New York, defendant, lately pending in our said court.

In testimony whereof, witness my hand and the seal of said court, affixed at Toledo, this 12th day of December, A. D. 1868.

[SEAL.] VICTOR KEEN, *Clerk.*

THE STATE OF OHIO,
Lucas County, ss:

Court of common pleas, Lucas County, Ohio.

At a term of the court of common pleas in and for the county of Lucas, and State of Ohio, begun and held at the court-house in the city of Toledo, in said county, on Monday, the 26th day of October, A. D. 1868—

3 Before Honorable John Fitch, presiding judge—

Among the proceedings then and there had by and before said court, as appears by its journal, were the following, to wit:

VINCENT HAMILTON, JOSIAH D. COOK.
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, New York. } 7350.

Upon the first day of the present term of this court, being the appearance term, in this action in this court, came the defendant, by its duly-authorized attorneys, Messrs. Haynes & Price, and entered its appearance in this action and filed therein its petition, praying, for reasons therein alleged, for the removal of said cause to the circuit court of the United States for the northern district of Ohio, and at the same time offered good and sufficient surety for such removal, according to law.

And the court being now fully advised in the premises, do find the several matters and things set forth in said petition, to be true as therein alleged, and the court do further find that the said cause is one which may properly be so removed to said circuit court, according to the Constitution and laws of the United States.

It is therefore ordered and adjudged that said defendant file a bond with the clerk of this court, in the sum of five hundred dollars, conditioned for the filing the proper papers in said cause, in the circuit court of the United States for the northern district of Ohio, on the first day of the next term thereof, next hereafter to be holden, and that thereupon said cause be removed to said court for trial.

And thereupon the defendant filed in said clerk's office, its bond, with two good and sufficient sureties, in pursuance of and according to the terms of the above order, and the law of the land on the subject, which bond was duly approved by said court.

In testimony whereof, witness Victor Keen, clerk of our said court of common pleas, and the seal thereof affixed, at Toledo, this
4 10th day of December, A. D. 1868.

[SEAL.] VICTOR KEEN, *Clerk.*

And afterward, to wit, on the 5th day of February, A. D. 1869, the following declaration was duly filed herein in said clerk's office, which is in the words and figures following, to wit:

Declaration.

Circuit court of the United States, northern district of Ohio. January term A. D. 1869.

VINCENT HAMILTON, JOSIAH D. COOK,
vs.
PHŒNIX INSURANCE COMPANY OF BROOKLYN, New York. } In assumpsit.

Vincent Hamilton and Josiah D. Cook, citizens of said State of Ohio,

residing at the city of Toledo, in the northern district of said State, complain of The Phœnix Insurance Company of Brooklyn, New York, a corporation created by the laws of the State of New York, duly served with process in a suit commenced by plaintiffs against defendant, by the name of The Phœnix Fire Insurance Company of Brooklyn, New York, in a court of common pleas, of Lucas County, Ohio, in said northern district of Ohio, which said suit has been by defendant transferred to this court, in a plea of assumpsit, for that whereas heretofore, to wit: on the first day of December, A. D. 1867, at the northern district of Ohio aforesaid, in consideration that the plaintiffs by the name, firm, and description of Hamilton and Cook, at the request of the defendant, had then and there undertaken and promised defendant to pay defendant the sum of sixty dollars, in case defendant should insure plaintiffs to the amount of ten thousand dollars against loss or damage by fire upon the grain hereinafter mentioned, for the full term of thirty days then next ensuing, and a proportionate sum, to wit, the amount of premium usually charged by defendant as its reward for assuming risks of like character, in case plaintiffs should at any time during
5 said period of thirty days, and before the expiration thereof, terminate said insurance in the manner hereinafter stated, the defendant then and there promised to insure plaintiffs, by the name, firm, and description aforesaid, against loss or damage by fire, to the amount of ten thousand dollars, upon all grain which should be in store in the building situate in said city of Toledo, owned and controlled by the Michigan Southern and Northern Indiana Railroad Company, known and described as Michigan Southern Elevator A, the property of plaintiffs, at any time during the term of thirty days then next ensuing, and upon all grain which should be in store in said building at any time during said term of thirty days, held by plaintiffs, in trust, and upon all grain which should be in store in said building at any time during said term of thirty days, held by plaintiffs on commission, unless plaintiffs should, before the expiration of said thirty days, terminate said insurance in the manner hereinafter stated; and defendant for the consideration aforesaid, then and there promised to pay plaintiffs by the name, firm, and description aforesaid, all loss and damage not exceeding said sum of ten thousand dollars, which should happen by fire to all and singular the grain aforesaid, at any time during the term of thirty days then next ensuing, unless plaintiffs should, during said term of thirty days, terminate said insurance in the manner hereinafter stated; and defendant then and there gave plaintiffs permission to have and effect such other insurance upon said property as plaintiffs should desire; and it was then and there agreed by and between plaintiffs and defendant that in case plaintiffs at any time during said term of thirty days, and before the expiration thereof, should notify defendant that plaint-
6 iffs desired that, after the date of such notice, defendant should no longer insure said property, that thereupon, defendant was not, after the date of such notice, to insure plaintiffs upon the property aforesaid; and plaintiffs were in such case instead of said sum of sixty dollars, to pay defendant the usual rate of premium claimed by defendant, for assuming a risk of the character aforesaid, for such time as should elapse between said first day of December, A. D. 1867, and the date of such notice, and plaintiffs say that plaintiffs did not, at any time, during said term of thirty days, notify defendant that plaintiffs desired that defendant should no longer assure said property; and that after said first day of December, A. D. 1867, to wit, on the twenty-fourth day of December, A. D. 1867, at said northern district of Ohio, plaintiffs paid the defend-

ant the full sum of sixty dollars aforesaid. And plaintiffs say that, on the 21st day of December, A. D. 1867, the said building was destroyed by fire; that there was in store in said building, at the date last aforesaid, and at the time of said fire, a large quantity of grain, to wit, thirteen thousand two hundred and seventy-four $\frac{35}{60}$ bushels of wheat, which said wheat was then and there the property of the persons hereinafter named as owners in common, in different respective amounts, to wit: said Vincent Hamilton, four hundred and fifteen $\frac{49}{60}$ bushels; said Josiah D. Cook, seventeen $\frac{06}{60}$ bushels; Norman Stuart, five hundred and fourteen bushels; Benjamin F. Joslin, six $\frac{49}{60}$ bushels; Henry Tracy, two hundred and eight $\frac{5}{60}$ bushels; J. W. Ridgway, ninety-six $\frac{48}{60}$ bushels; W. C. Nelson, three thousand seven hundred and two $\frac{15}{60}$ bushels; A. J. Wair, one
7 hundred and thirty-five $\frac{30}{60}$ bushels; W. W. Ganard, one hundred and twenty-four and $\frac{10}{60}$ bushels; Edward Marshall, five thousand two hundred and eighty two $\frac{20}{60}$ bushels; certain persons, partners in trade, doing business under the partnership name & firm of Pursel and Company, thirty-one hundred and forty-four $\frac{40}{60}$ bushels. The full first names of the owners hereinbefore designated by initials, being to plaintiffs unknown; said Stuart residing at Salem Crossings; said Ridgway, Nelson, Wair, and Ganard, at Laporte; said Marshall at Rolling Prairie, all in the State of Indiana; said Joslin & Tracey at Sturgis, Michigan; and the place of business of said Pursel & Company being at Schoolcraft, in the State of Michigan. And plaintiffs say that all of said grain was then and there held by said plaintiffs, under their name, firm, and description aforesaid, in trust for the respective owners aforesaid, and that all of said grain, with the exception of said portion thereof belonging to said Vincent Hamilton and Josiah D. Cook, respectively, as aforesaid, was then and there held by plaintiffs, under their name, firm, and description, as aforesaid, on commission. And plaintiffs say that the value of said wheat was then and there a large sum of money, to wit, the sum of thirty-four thousand five hundred $\frac{8}{100}$ dollars, and that all of said wheat and the said value thereof was then and there destroyed by said fire. And plaintiffs say that other insurance had then and there been effected by plaintiffs upon the wheat aforesaid, in a large amount, to wit, in the sum of nineteen thousand dollars, and that the proportionate share of said loss and damage then and there due from defendant to plaintiffs, under defendant's promise of insurance aforesaid, was
8 then and there a large sum of money, to wit, the sum of ten thousand dollars, in defendant's said promise mentioned, of all which said several premises, the defendant afterward, to wit, on the day and year last aforesaid, at the northern district of Ohio aforesaid, had notice. And plaintiffs say that, afterward, to wit, on the 9th day of April, A. D. 1868, at said northern district of Ohio, plaintiffs requested defendant to pay plaintiffs the said sum of ten thousand dollars aforesaid; yet, the defendant hath not paid plaintiffs the said sum of money, nor any part thereof, but hath hitherto wholly refused, and still doth refuse to do, to wit, at the northern district of Ohio aforesaid. And whereas, also, heretofore, to wit, on the first day of December, A. D. 1867, at said northern district of Ohio, the plaintiffs, by the name, firm, and description of Hamilton & Cook, caused to be made a certain policy of insurance, partly written and partly printed, purporting thereby, and containing therein that, in consideration of sixty dollars, to defendant paid by plaintiffs, under the firm-name and description of Hamilton & Cook, the receipt of which the defendant thereby acknowledged, the defendant did insure plaintiffs by the name, firm, and description of Hamilton & Cook, of Toledo, against loss or damage by fire, to the amount of ten

thousand dollars, on grain in store, in the building situate in said city of Toledo, known and described as Michigan Southern Elevator A. aforesaid, the property of plaintiffs, or held by plaintiffs in trust, or on commission, or sold by plaintiffs and not delivered; that plaintiffs were permitted to have and effect such other insurance upon said property, as plaintiffs desired; that defendant, for the consideration
9 aforesaid, did thereby promise and agree to make good unto plaintiffs, by their name, firm, and description aforesaid, their executors, administrators, or assigns, all such loss or damage not exceeding in amount the said sum of ten thousand dollars, as should happen by fire to all and singular the property as aforesaid specified during thirty days, to wit, from the first day of December, A. D. 1867, at twelve o'clock, at noon, until the thirty-first day of December, A. D. 1867, at twelve o'clock, at noon, the said loss or damage to be estimated according to the actual cash value of the said property at the time the said loss or damage should happen, and to be paid by defendant to plaintiffs within sixty days after due notice and proofs thereof made by plaintiffs in conformity to the conditions annexed to said policy, unless the said property should be replaced by similar property of equal value and goodness; said policy then and there containing a proviso that said defendant should not be liable to make good any loss or damage by fire, which might happen by means of or during an invasion, insurrection, riot, or civil commotion, or of any military, or usurped power, or any loss by theft, at or during a fire. And a further proviso that, if any other insurance had been, or should thereafter be, effected upon the said property, and not consented to by defendant, in writing, upon said policy, or if the property should be sold or conveyed, or the interest of the plaintiffs therein changed, or if said policy should be assigned without the consent of the defendant obtained, in writing, thereon, or if the insured should make any attempt to defraud said defendant, then and in every such case, said policy should be null and void; that the
10 commencement of foreclosure proceedings, or the levy of an execution should be deemed an alienation of the property; that in case of loss said plaintiffs should not be entitled to demand and recover on said policy any greater proportion of the loss and damage sustained to the property insured aforesaid than the said sum of ten thousand dollars should bear to the whole amount insured, (whether the same should be valid or not) on the said property, it being in and by said policy then and there further agreed and declared to be the true intent and meaning of the parties thereto, that, in case the above-mentioned premises should be, at any time during which said policy would otherwise continue in force, used for more hazardous purposes than that called for in the original contract of insurance, or should become vacant or unoccupied, unless agreed to by defendant, in writing, upon said policy, from thenceforth, so long as the said premises should be unoccupied, or the hazard otherwise increased, said policy should be of no force and effect; that petroleum, rock, earth, kerosene, or carbon oils of any description, benzine, benzole, naptha, camphene, spirit-gas, burning-fluid, turpentine, phosegene, or any other inflam'able liquid were not to be stored, kept, or allowed on said premises, temporarily or permanently, for sale or otherwise, unless with written permission endorsed on said policy, excepting the use of refined coal, kerosene, or other carbon oils for lights, if the same were drawn and the lamps filled by daylight; otherwise said policy would be null and void; and gunpowder, or any other article subject to legal restrictions, should be subject to the same restrictions, prohibitions, limitations, and conditions, under the said policy, as petroleum and *and*

11 other articles next hereinbefore mentioned. And that if any property insured by said policy should be damaged by lightning, or the bursting of a boiler, or an explosion from any cause, defendant should not be liable therefor, unless fire ensued, and then only for the loss by fire, which should be determined by the value of the damaged property after the casualty by lightning or explosion. And that said policy was made and accepted according to the terms and conditions therein contained and thereto annexed, which were thereby declared to be a part of said contract, and were to be used and resorted to in order to determine the rights and obligations of the parties thereto, in all cases not therein otherwise specially provided for; which said annexed terms and conditions were printed as follows: Provisons and threshed grain, with the buildings containing the same, were included in the class designated as hazardous; camphene, burning-fluid, spirit-gas, phosgene, or any other inflam'able liquid, when used in warehouses as a light, should subject the goods therein to an additional charge, and that permission for said use must be endorsed on said policy, otherwise said insurance would be void. That when buildings containing property insured by defendant were being altered or repaired, or when mechanics were working therein, notice thereof should be given defendant, and consent thereto must be given by defendant and endorsed upon said policy. That application for insurance on property should be in writing, which should specify the construction and material of the building containing the property to be insured, by whom occupied, whether as a private dwelling, or how otherwise, its situation with regard to contiguous buildings, and their construction and materials and whether
12 any manufacturing were carried on within or about it, and whether the goods and merchandise to be insured were or were not of the description denominated hazardous, extra hazardous, or specially hazardous, which description and survey should be taken and deemed to be a part & portion of the policy issued thereon, and a warranty on the part of the insured; that if any person effecting insurance with defendant should make any misrepresentations or concealment touching the risk to be assumed, or if, during the existence of said policy, the risk should be increased by any means, or by the occupation of said premises for more hazardous purposes than were permitted by said policy, or if the insured, before the taking of any renewal, should fail to notify defendant of any increase in the hazard, whether within or without the premises, and have the same endorsed on the policy, then said policy should be void; that said insurance might be at any time terminated at the option of defendant, on defendant's giving notice to that effect, and refunding to plaintiffs a ratable proportion of the premium for the unexpired term of the policy; that said insurance might also be terminated at any time at the request of the insured, in which case defendant might retain the customary short rates for the time said policy had been in force; that if the property to be insured should be held in trust, or on commission, or be a leasehold, or other interest not absolute, it must be so represented to defendant, and expressed in the policy, in writing; otherwise the insurance as to said property should be void, and in case of loss, the names of the respective owners should be set forth
13 in the preliminary proofs of said loss, with their respective interests therein, and the assured's obligation to be liable therefor, or to keep the same insured; that goods held on storage should be separately and specifically insured; that no insurance should be considered as binding until the actual payment of the premium; that whenever defendant should pay any loss, the assured agreed to assign over all their

right to recover satisfaction therefor from any other person or persons, town or other corporation, or to prosecute therefor at the charge and for the account of the defendant, if requested; that if at the happening of a fire the insured should have any insurance under a floating policy or policies, not specific, but covering goods generally, in various places not designated, and yet within limits, which should include the property insured by defendant as aforesaid, such floating policies, as between the insured and defendant, should be considered as co-insurance with said policy executed by defendant, anything in the floating policy to the contrary notwithstanding; that in case of fire, or loss, or damage thereby, or of exposure to loss and damage thereby, it should be the duty of the insured to use their best endeavors for saving and preserving the property; and that, if they should fail to do so, defendant should not be held liable to make good the loss or damage sustained by said neglect. That it was mutually understood that there could be no abandonment to the insurers of the subject insured; that persons sustaining loss or damage by fire should forthwith give notice thereof in writing to the defendant or its agents, and as soon thereafter as
14 possible, they should deliver as particular an account of the loss and damage as the nature of the case would admit, signed with their own hands, and they should also accompany the same with their own oath or affirmation, declaring the said account to be true and just, showing also the ownership of the property to be insured; what other insurance, if any, existed on the same property, and give a copy of the written portion of each company, what was the whole cash value of the subject insured, what was their interest therein, in what general manner, as to trade, manufactory, or merchandise, or otherwise, the building containing the subject insured, and the several parts thereof, were occupied at the time of said loss, and who were the occupants of said building, and when and how the fire originated, as far as they should know or believe. That they should also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds, most contiguous to the place of the fire, not concerned in the loss as creditors or otherwise, nor related to the assured or sufferers, stating that he had examined the circumstances attending the fire, loss or damage, as alleged; that he was acquainted with the character and circumstances of the assured or claimants, and that he verily believed that he, she, or they had, by misfortune, and without fraud or evil practice, sustained loss or damage on the subject insured, to the amount of which said magistrate, notary public, or commissioner of deeds shall certify. That when merchandise or other personal property should be partially damaged, the assured should forthwith cause it to be put in as good
15 order as the nature of the case would admit, separating the damaged from the undamaged articles, and should cause an inventory or list of the whole, naming the quantity and cost of each article, to be made and furnished defendant. That in case differences should arise concerning the amount of loss, the amount of sound value, and of damage should be ascertained by an examination and appraisal of each article, by disinterested appraisers, mutually agreed upon, one-half of the appraisers fees to be paid by defendant. That the insured should, if required, submit to an examination under oath, by the agent or attorney of the company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, or to their claim therefor, and subscribe such examination, the same being reduced to writing, and that when required in writing the insured, or persons claiming should produce and exhibit his or their books of account and other vouch-

ers to defendant or its agents at the office of defendant, in support of the said claim made by the insured, and permit extracts and copies thereof to be made, and should also produce bills, or certified copies of any bills or invoices of any property destroyed or damaged, the originals of which may have been destroyed, or mislaid, or lost, and should also exhibit to any persons named by defendant, and should permit to be examined by them, any property damaged, on which any loss should be claimed, or any property saved, which was insured by said policy; and that until such proofs, declarations, and certificates should be produced, and such appraisals and examinations of property permitted by the claimants, said loss should not be payable. That all fraud or attempt at
16 fraud by false swearing or otherwise, should cause a forfeiture of all claim upon defendant under said policy. That in case of any loss or damage to the property insured, it should be optional with the defendant to replace the articles lost or damaged, with others of the same kind or quality, or to take the goods at their appraised value, within a reasonable time, giving notice of their intention so to do, within thirty days after having received the preliminary proofs of loss herein before mentioned, and that the assured if required should furnish plans or specifications of the buildings or other property destroyed. That in case differences should arise concerning the amount of any loss or damage by fire, the matter should, at the written request of either party be submitted to the judgment of arbitrators, indifferently chosen, whose award in writing as to the amount of such loss or damage should be binding on the parties, but should not determine any question as to the liability of the defendant under said policy. That defendant would not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stone or brick chimney, or in consequence, or neglect of, or deviation from, the laws and regulations of police made to prevent accidents from fires in places where laws and regulations on this subject should exist, as by the said policy of insurance, and conditions annexed, reference being thereto had, will more fully appear. Of all which said premises defendant afterward, to wit, on said first day of December, A. D. 1867, at the northern district of Ohio aforesaid, had notice.

And thereupon, afterwards to wit, on the day and year last afore-
17 said, at the northern district of Ohio aforesaid, in consideration that plaintiffs, at the request of defendant, had then and there promised defendant to pay defendant the said sum of sixty dollars, in said policy of insurance mentioned, whenever defendant should request such payment, and had then and there promised defendant to perform and fulfil all things in said policy of insurance contained on the part of plaintiffs to be fulfilled and performed, defendant then and there gave permission to plaintiff by writing in said policy to effect such other insurance upon said property as plaintiffs should desire, and then and there waived all written application for insurance upon said property, and released plaintiffs from all obligations to make the same, and then and there waived the prepayment of the premium, and released the plaintiffs from all obligation to make the same prior to the taking effect of the insurance in said policy mentioned, and then and there released plaintiffs from all obligations to specify what portion of the property in store as aforesaid was the property of plaintiffs, and what portion of the same was held by plaintiffs in trust or on commission, and then and there promised plaintiffs by the name, firm, and description of Hamilton & Cook as aforesaid, that defendant would become and be an insurer to plaintiffs by the name, firm, and description aforesaid, of the said sum of

ten thousand dollars upon the grain aforesaid, and would perform and fulfil all things in the said policy of insurance contained on the part of defendant to be performed and fulfilled; and the defendant then and there, by Stephen Crowell, its president, Philander Shaw, its secretary, and certain persons partners in the business of insurance at said city of Toledo, under the firm-name of Shipherd & Scott, its agents, duly
18 subscribed the said policy, and then and there affixed to said policy an internal revenue stamp of the denomination of fifty cents, which stamp was by defendant then and there duly cancelled. And plaintiffs say that, on said first day of December, A. D. 1867, and from thence continually afterwards, until and at the time of the loss hereinafter mentioned, there was in store in said building a large quantity of grain, to wit, thirteen thousand two hundred and seventy-four $\frac{35}{60}$ bushels of wheat, which said wheat was then and there the property of the persons hereinafter mentioned as owners in common, in different respective amounts to wit: said Vincent Hamilton, four hundred and fifteen $\frac{42}{60}$ bushels; said Josiah D. Cook, seventeen $\frac{6}{60}$ bushels; Norman Stewart, five hundred and fourteen bushels; Benjamin F. Joslin, six $\frac{42}{60}$ bushels; Henry Tracey, two hundred and eighty-eight $\frac{5}{60}$ bushels; J. W. Ridgway, ninety-six $\frac{45}{60}$ bushels; W. C. Nelson, three thousand seven hundred and two $\frac{15}{60}$ bushels; A. J. Wair, one hundred and thirty-five $\frac{30}{60}$ bushels; W. W. Ganard, one hundred and twenty-four $\frac{10}{60}$ bushels; Edwin Marshall, five thousand & two hundred and eighty-two $\frac{27}{60}$ bushels; certain persons, partners in trade, doing business at Schoolcraft, in the State of Michigan, under the partnership name and firm of Pursel & Company, thirty-one hundred and forty-four $\frac{40}{60}$ bushels; the full first names of said owners, designated by initials, being to plaintiffs unknown; said Stuart residing at Salem Crossings; said Ridgway, Wair, Nelson, & Ganard at Laporte; said Marshall at Rolling Prairie, all in the State of Indiana; and said Joslin and Tracey at Sturgis, in the State of Michigan. And plaintiffs say that all of said grain was then and there held by said plaintiffs, under their name, firm, and
19 description aforesaid, in trust for the respective owners aforesaid, and that all of said grain, with the exception of the portions thereof belonging to said Vincent Hamilton and said Josiah D. Cook, respectively, was then and there held by plaintiffs in their name, firm, and description aforesaid, on commission; and plaintiffs say that said grain was then and there of great value, to wit, thirty-four thousand five hundred and eighteen $\frac{08}{100}$ dollars. And plaintiffs say that, on the 21st day of December, A. D. 1867, the building last aforesaid, being the building known as the Michigan Southern Elevator A, was destroyed by fire; that a small quantity, to wit, one thousand three hundred and eighteen $\frac{57}{100}$ bushels of said grain was then and there saved from said fire in a damaged condition, which damaged condition was then and there caused by said fire; and that all the remainder of said grain, to wit, eleven thousand nine hundred and fifty-six $\frac{1}{75}$ bushels thereof, was then and there totally destroyed by said fire; that the actual cash value of said wheat saved, was then and there a small *some* of money, to wit, three thousand three hundred and eighty-eight $\frac{70}{100}$ dollars, and no more. And plaintiffs say that the actual cash value of the property destroyed as aforesaid, and the actual value of the damage done by said fire to the property saved as aforesaid, was then and there a large sum of money, to wit, the full sum of thirty-one thousand one hundred and twenty-nine $\frac{35}{100}$ dollars. And plaintiffs say that said fire did not happen by means of nor during any invasion, insurrection, riot, or civil commotion, nor of any military or usurped power; that the said property was not sold nor conveyed, nor the interest of the parties therein changed dur-

ing the term in said policy specified; that said policy was
20 not assigned; that plaintiffs made no attempt to defraud defendant, and committed no fraud; that no foreclosure proceedings were commenced, nor was any execution levied upon said property. And plaintiffs say that, at the date of the loss hereinbefore mentioned, at said northern district of Ohio, plaintiffs had effected other insurance upon said property with other insurance companies, hereinafter mentioned, in the respective amounts hereinafter mentioned, to wit: With the Corn Exchange Insurance Company of New York, five thousand dollars; with the City Fire Insurance Company of Hartford, Connecticut, two thousand dollars; with Germania, Hanover, Niagara, and Republic Fire Insurance Companies, of New York, each the one-quarter part of five thousand dollars, and with the Cleveland Insurance Company of Cleveland, Ohio, two thousand dollars; and that, by reason of said other insurance, the proportionate part of said loss and damage of and to the property aforesaid, then and there to be made good by defendant under the agreement aforesaid, was then and there a large sum of money, to wit, nine thousand eight hundred and fifteen $\frac{63}{100}$ dollars. And plaintiffs say further that said building was not, during the term mentioned in said policy, used for more hazardous purposes than that called for in the original policy of insurance, and that said building did not, during the term aforesaid, become vacant or unoccupied; that no petroleum, rock, earth, coal, kerosene, or carbon oils of any description, benzene, benzole, nap'tha, camphene, spirit-gas, burning-fluid, turpentine, p'osgene, nor other inflam'able liquid was, at any time during said
21 term, stored, kept, used, or allowed in said building, nor at any time during said term was any oil drawn, nor were any lamps filled in said building by night, nor at any time during said term was any gunpowder nor other articles subject to legal restrictions kept in said building; neither was the property aforesaid damaged by lightning, nor by the bursting of a boiler, nor by explosion from any cause. And plaintiffs say further that plaintiffs made no misrepresentations nor concealment touching the risk to be assumed by said defendant in said policy specified, nor at any time during said term was the risk increased, nor was said building occupied for more hazardous purposes than were permitted by said policy; neither was the insurance specified in said policy terminated at any time prior to the loss above mentioned, but said insurance remained in full force at the time of said loss, at the northern district of Ohio aforesaid. And plaintiffs say further that, at the time of said fire, plaintiffs had no insurance upon said grain in any floating policy, and that during all times during the term specified in said policy, and at the time of said fire, and at all times after said fire, plaintiffs at said northern district of Ohio, used their best endeavors for saving and preserving the grain aforesaid. And plaintiffs say further, that forthwith after said fire, at said northern district of Ohio, plaintiffs gave verbal notice to Walter C. Scott, one of the members of said firm of Shipherd and Scott, the agent of defendant, that plaintiff had sustained loss and damage by the fire aforesaid. And plaintiffs say that defendant then and there waived written notice from plaintiffs of said loss and damage, and released plaintiffs from all obligation to make the same. And plaintiffs
say that thereafter, to wit, on the twenty-fourth day of December,
22 A. D. 1867, at said northern district of Ohio, plaintiffs, at request of defendant, paid to defendant the said sum of sixty dollars, the premium of insurance hereinbefore last above mentioned. And plaintiffs say further that, as soon after said fire as was possible, to wit, on the third day of February, A. D. 1868, at said

northern district of Ohio, said Josiah D. Cook, in behalf of plaintiffs, did deliver to defendant as particular an account of plaintiffs' said loss and damage as the nature of said case would admit, signed with the hand of the said Josiah D. Cook, and accompanied the same with his own oath, declaring the said account to be true and just, shewing also the ownership of the property insured, all other insurance existing on said property, with a copy of the written portion of the policy of each company insuring the same; the whole cash value of the subject insured, and the interests of plaintiffs therein; in what general manner the said building and the several parts thereof were occupied at the time of said loss, and who were the occupants of said building; that said fire originated in a manner and from causes entirely unknown to affiant; and then and there produced and delivered to defendant a certificate under the hand and seal of a notary, to wit, one John H. Doyle, most contiguous to the place of fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers, stating that he had examined the circumstances attending the fire and damage alleged; that he was well acquainted with the character and circumstaances of the insured, and did verily believe that said insured had, by misfortune, and without fraud or evil practice, sustained loss
23 and damage on the property insured to the amount of thirty-four thousand five hundred and eighteen $\frac{18}{100}$ dollars, less three thousand three hundred and eighty-eight $\frac{73}{100}$ dollars, the value of the property saved as aforesaid; which said account, oath, and certificate was then and there accepted by defendant, as and for a full compliance on the part of the plaintiffs, with the requirements of said policy, relative to proof of loss and damage, and released plaintiffs from all obligations to comply further with the requirements of said policy, relative to proof of loss and damage. And plaintiffs say further, that forthwith after said fire, at said northern district, plaintiffs caused said property saved to be put in as good condition as the nature of the case would admit, and then and there caused a statement to be made to the defendant, of the quantity and value of the property saved, which said statement was then and there accepted by the defendant as a full compliance on the part of the plaintiffs, with the provisions of said policy relative to the list or inventory to be made by the insured, of partially-damaged property; and defendant then and there waived the production by the plaintiffs of other or further list or inventory of said partially-damaged property, and then and there released plaintiffs, from all obligations, to make the list or inventory of partially-damaged property in said policy specified. And plaintiffs further say that no difference arose between plaintiffs and defendant concerning the amount of said loss and damage; that plaintiffs in all and singular the premises aforesaid, were guilty of no fraud; that defendant has never replaced nor offered to replace said property lost and damaged by property of equal value and goodness,
nor has defendant ever required plaintiffs to submit to an exam-
24 ination, under oath, nor has defendant ever required in writing, that plaintiffs or the owners of said property should produce any books and papers. Plaintiffs say that they have always been ready and willing, at said northern district of Ohio, to exhibit to any person named by defendant, the damaged property saved from said fire, and to permit said persons to examine the same; that defendant has never named any person for that purpose, nor has defendant ever taken said goods saved at their appraised value, nor given notice of its intention so to take the same, nor has defendant at any time required plaintiffs to furnish plans and specifications of said building and property de-

stroyed. And plaintiffs say that at no time during the term specified in said policy, were said buildings altered or repaired, nor during said term were any mechanics working therein; that plaintiffs have always been ready, at said northern district of Ohio, upon payment to them by defendant, of the loss aforesaid, to assign to them all their right to recover satisfaction therefor from any other person or persons, town or other corporation, or to prosecute therefor at the charge and expense of defendant; and plaintiffs have always been there willing to do and perform all other things on their part by said policy of insurance to be performed, and have there done and performed all and singular the same. And plaintiffs say that, at the time of said loss, said building was provided with a good and substantial brick chimney; that said loss did not arise from the use of fires in said building, nor was said fire occasioned by any neglect of, nor did it happen in consequence of any deviation from, any laws or regulations of police, made in said city of Toledo, to prevent accidents from fire. Of all which said several premises, the defendant, afterward, to wit, on the third day of February, A. D. 1868, at said northern district of Ohio, had notice, and was afterward, to wit, on the ninth day of April, A. D. 1868, at said northern district of Ohio, requested by plaintiffs to pay plaintiffs said sum of nine thousand eight hundred and fifteen $\frac{63}{100}$ dollars, the loss and damage last above mentioned, for the use and benefit of the parties in interest as aforesaid; yet defendant did not pay the moneys last above-mentioned, nor any part thereof, but has hitherto refused, and still doth refuse so to do, to wit, at the northern district of Ohio aforesaid, to the damage of plaintiffs, fifteen thousand dollars; and therefor they bring their suit.

M. R. & R. WAITE,
E. BISSELL, *Pl'ffs Att'ys.*

Endorsement for costs.

Said declaration was endorsed for costs in the words and figures following, to wit:

I, Benjamin W. Goode, acknowledge myself security for all costs for which plaintiffs may be liable in this suit.

BENJ. W. GOODE. [L. S.]

TOLEDO, *Feb.* 4, 1869.

Entry.

And afterward, to wit, at the January term of said court, to wit, on the 16th day of February, A. D. 1869, on motion of defendant, by T. K. Bolton, its attorney, leave is hereby granted to extend the time for filing plea herein to thirty days from and after the regular day for filing said plea.

Entry.

And afterward, to wit, at said January term of said court, to wit, on the 25th day of February, A. D. 1869, on motion of defendant, by Ranney & Bolton, its attorneys, it is ordered that the said defendant have leave to plead to the plaintiffs' declaration within thirty days, and this cause is continued to the next term of this court.

Plea.

And afterward, to wit, on the 27th day of March, A. D. 1869, the following plea, of defendant, was duly filed herein, in said clerk's office, which is in the words and figures following, to wit:

In the circuit court of the United States for the northern district of Ohio.

26 THE PHŒNIX INSURANCE COMPANY OF Brooklyn, New York, *ads.* VINCENT HAMILTON AND JOSIAH D. COOK. } Plea.

And the said Phœnix Insurance Company, by Ranney & Bolton, its attorneys, comes and defends, &c., and says that it did not assume and promise, in manner and form as the said Vincent Hamilton and Josiah D. Cook, have declared against it; and of this it puts itself upon the country. And the said Hamilton & Cook do the like, &c.

By RANNEY & BOLTON,
Att'ys for Phœnix Insurance Co.

Continued.

And afterward, to wit, at the May term of said court, to wit, on the 12th day of August, A. D. 1869, this cause is continued to the next term of this court.

Trial by jury.

And afterward, to wit, at the September term of said court, to wit:

On the 18th day of October, A. D. 1869, came the parties, by their attorneys, and this cause coming on for trial upon the issues joined between the parties, and a jury being called, came to wit: E. D. Carleton, Stephen T. Cunnard, Alfred Morely, Samuel G. Brown, David McCullough, David Anderson, Thomas Buneham, Seth A. Abbey, Charles H. Ray, Samuel J. Page, Amos S. Hutchinson, and Samuel H. Fox, good and lawful men, who were duly impan'eled and sworn the truth to speak, upon the issues aforesaid.

And the testimony of witnesses being concluded, but the arguments of counsel not yet having been fully completed, the further trial of this cause is adjourned until to-morrow morning, at nine o'clock.

Trial continued and concluded.

And afterward, to wit, at said September term, to wit, on the 19th day of October, A. D. 1869, came again the parties, by their attorneys, and also came the jurors of the jury empan'eled and sworn herein on yesterday, who, upon their oath aforesaid, do find and say that the defendant did assume and promise, in manner and form as the said
27 plaintiffs have complained against it, and do assess the damages, by reason of the premises to the sum of nine thousand nine hundred and seventy-one dollars and sixteen cents, ($9,971 16.)

And thereupon the said defendant, by Ranney & Bolton, its attorneys, moved the court to set aside the said verdict, and to grant a new trial

herein, for the reason and causes set forth in said motion now on file, which said motion is in the words and figures following, to wit:

Motion for new trial.

In the circuit court of the United States for the northern dist. of Ohio.

VINCENT HAMILTON & JOSIAH D. COOK
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKlyn, N. Y. } Motion for N. T.

And now comes the said defendant and moves the court for a new trial in this cause, for the following reasons, to wit: 1st, because the verdict is against the law and evidence; 2nd, because the court erred in refusing to charge as requested by the defendant, and in the charge as given; 3rd, for other reasons. Wherefore the defendant asks that the verdict may be set aside, & new trial be ordered.

R. P. RANNEY,
Att'y for Def't.

And afterward, to wit, on the 27th day of December, A. D. 1869, the following bill of exceptions was duly filed herein in said clerk's office; which said bill of exceptions is in the words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States for the northern district of Ohio.

VINCENT HAMILTON & JOSIAH D. COOK
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKlyn, New York. Assumpsit. } Bill of exceptions.

Be it remembered that, upon the trial of this cause to the jury at the September term, A. D. 1869, of the circuit court of the United States for the northern district of Ohio, the plaintiffs, to maintain the issue on their part, gave in evidence to the jury the following agreed statement of facts, to wit:

VINCENT HAMILTON ET AL.
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKlyn.

28 *Agreed statement upon the trial of the above cause.*

It is admitted that the following facts are proved:

On the first day of December, A. D. 1867, defendant, by its agent at Toledo, executed the policy hereunto annexed, marked "A." Prior to the first day of July, 1867, plaintiffs were partners at Toledo, as grain commission merchants, under the firm-name of Hamilton & Cook. By the general usage of business of grain commission merchants at Toledo, all grain consigned there was insured by the consignee for the benefit of the consignor, while the same remained in store in said city, in all cases

where the consignor gave no directions to the contrary. The business of said firm was conducted in accordance with said custom, their contracts of insurance being generally effected through their book-keeper, Mr. Bellman, who had full authority from said partners to act in their said behalf. On the first day of July, A. D. 1867, plaintiffs executed the agreement for a dissolution of their said partnership, marked "B." No notice was given of said dissolution until the first day of January, 1868, nor was any change made whatever in the conduct of said business, from which parties theretofore dealing with said firm could infer said dissolution, said business continued to be transacted from said first day of July to said first day of January, by said Josiah D. Cook, in said firm-name of Hamilton & Cook, and for his own benefit, the said Cook having all the profits and paying all the losses consequent thereon, and controlling the whole business. The books theretofore kept by said firm were continued without change, and were kept by said Bellman. An account was kept on said books of transactions in which Hamilton was individually interested, the same as any customer, except
29 that no commissions were charged. On said first day of December, A. D. 1867, said agent of defendant applied to said Bellman at the place of business aforesaid, and asked him how much insurance he wanted. He replied, ten thousand dollars, upon grain in Elevator A. Whereupon said agent executed said policy and delivered the same to said Bellman. No notice was given defendant or its agents of said agreement of dissolution of July first. At the time of executing said policy said agent supposed plaintiffs to be partners, and delivered said policy to said Bellman as their agent. The title to grain in the said elevator building was evidenced by warehouse receipts or grain orders, issued by said railroad company. The care and custody of said building, and the grain therein contained, devolved entirely upon the agents and employees of said Michigan Southern and Northern Indiana Railroad Company. On the night of the 21st of December, 1867, said elevator building was burned. There was in said building at the time of said fire the wheat mentioned in the second count of plaintiffs' declaration, less its proportion, if any, of grain subsequently ascertained to have been abstracted by the employees of said railroad company, subsequently paid for by said company, and accounted for to defendants by plaintiffs as so much salvage. All of said wheat belonged to the owners mentioned in the second count of plaintiffs' declaration in the respective amounts therein stated. All of said owners, other than the said Hamilton and the said Cook, were customers and correspondents of said firm of Hamilton & Cook prior to said first day of July, A. D. 1867. None of them had, prior to said fire, received any notice of said agreement of dissolution. None of them had ever notified said Hamilton & Cook not to
30 insure their grain, but all had either given express instructions to insure, or had settled accounts *accounts* with Hamilton & Cook in which insurance was charged without objection. All of said grain was shipped by said owners to said Hamilton & Cook, at Toledo, to be held by said Hamilton & Cook, as factors and commission merchants, at Toledo, on account of said owners, without any knowledge of the said owners of any change in the partnership relations existing between said plaintiffs. The warehouse receipts for all of said grain were taken in the name of Hamilton & Cook, and were held by said Cook, doing business under said name of Hamilton & Cook. Said Cook, under the name of Hamilton & Cook, had, at the date of said fire, advanced to and for the owners of the said grain, on account thereof, including interest, the sum of $13,387 10, which constituted a lien upon said property.

Defendant is willing to admit that the value of said wheat at the time of said fire was $34,214 01; that the amount of storage was $146 59, and the value of the property saved was $4,795 77, and that if defendant is liable for its proportion of all of said grain lost, judgment is to be entered against it for $9,442 46, with interest from April 9th, 1868, and that the value of said grain belonging to said Hamilton & Cook individually was $2 57 per bushel, less $14\frac{17}{1000}$ p. cent. thereof for salvage. In case plaintiffs desire to prove any of said valuations too low, they are at liberty to do so. Defendant makes no objections to the proofs of loss furnished by plaintiffs; nor does it claim that plaintiffs violated any of the covenants or conditions on the part of plaintiffs by said policy to be performed, except as hereinafter stated, or as may be
31 implied in law from the facts hereinbefore stated. As to all matters not herein admitted as proven, either party is at liberty to offer evidence upon the trial, it being expressly understood that nothing herein contained is to bar plaintiffs of the right to prove at the trial that the conduct of said business as aforesaid, after said first day of July, A. D. 1867, was in pursuance of an agreement between said Hamilton and said Cook, made on or about the date last aforesaid.

BISSELL & GORRILL,
Plff's Atty's.

JOHN SEWELL,
Agent Phœnix Ins. Co.

They also gave in evidence the policy of insurance annexed to said agreed statement, and marked "A," as therein referred to, in the words and figures following, to wit:

Stock company, No. 487.

By this policy of insurance The Phœnix Insurance Company of Brooklyn, N. Y., in consideration of sixty dollars to them paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, do insure Hamilton & Cook against loss or damage by fire to the amount of ten thousand dollars, on grain, in store Michigan Southern Elevator A, their own, or held by them in trust or on commission, or sold and not delivered. Other insurance permitted. And The Phœnix Insurance Company, above named, for the consideration aforesaid, do hereby promise and agree to make good unto the said assured, their executors, administrators, or assigns, all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property as above specified during thirty days, to wit, from the first day of December, one thousand eight hundred and sixty-seven, (at twelve o'clock at noon,) until the thirty-first day of December, one thousand eight hundred and sixty-seven, (at twelve o'clock at noon,) the
32 said loss or damage to be estimated according to the actual cash value of the said property at the time the same shall happen, and to be paid within sixty days after due notice and proof thereof, made by the assured in conformity to the conditions annexed to this policy, unless the property be replaced by similar property of equal value and goodness, or the company have given notice of their intention to repair or rebuild the damaged premises: Provided, always, and it is hereby declared that this corporation shall not be liable to make good any loss or damage by fire which may happen by means of or during an invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire: And provided, further, that

if any other insurance has been or shall be hereafter made upon said property, and not consented to by this company in writing herein, or if the said property shall be sold or conveyed, or the interest of the parties therein changed, or if this policy shall be assigned without the consent of the company obtained in writing hereon, or if the insured shall make any attempt to defraud the company, then, and in every such case, this policy shall be null and void. The commencement of foreclosure proceedings or the levy of an execution shall be deemed an alienation of the property. In case of loss the insured shall not be entitled to demand or recover on this policy any greater proportion of the loss or damage sustained to the subject insured than the amount hereby insured shall bear to the whole amount insured (whether the same shall be valid or not) on the said property; and it is agreed and declared to be the true meaning and intent of the parties hereto
33 that, in case the above-mentioned premises are, at any time during the period for which this policy would otherwise continue in force, used for more hazardous purposes than that called for in the original contract of insurance, or shall become vacant and unoccupied, unless agreed to by this corporation in writing upon this policy, from thenceforth, so long as the same shall be unoccupied and vacant, or the hazard otherwise increased, this policy shall be of no force or effect; and it is moreover agreed and declared that this insurance is not intended to apply to or cover any books of account, written securities, deeds, or other evidences of title to property, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion; and that casks, curiosities, engravings, jewels, jewelry, medals, models, musical and scientific instruments, (piano-fortes in dwelling-houses excepted,) paintings, patterns, plates, precious stones, printed music, sculptures, statuary, and watches, are not deemed to be in any insurance, unless particularly specified in writing in said policy. Petroleum, rock, earth coal, or kerosene or carbon oils of any description, whether crude or refined, benzine, benzole, naptha, camphene, spirit-gas burning-fluid, turpentine, phosgene, or any other inflam'able liquid are not to be used, stored, kept or allowed on the above premises temporarily or permanently, for sale or otherwise, unless with written permission endorsed on this policy, excepting the use of refined coal, kerosene, or other carbon oils for lights, if the same is drawn, and the lamps filled by daylight; otherwise this policy shall be null and void. Gunpowder or any other article subject to legal restrictions, it is understood and agreed upon, are subject to the same restrictions, prohibitions, limitations,
34 and conditions, under this policy, as the articles mentioned in the section next preceding this. Plate-glass doors and windows, where the plates are of the dimensions of three feet square or more, are subject to an extra premium, and must be separately and specifically insured; otherwise they are not protected by this policy. Fences, privies, and other yard fixtures, also store furniture and fixtures, must be separately and specifically insured; otherwise they are not protected by this policy. If any property covered by this insurance be damaged by lightning, or the bursting of a boiler, or by explosion from any cause, this company shall not be liable therefor, unless fire ensues, and then for the loss by fire only, which shall be determined by the value of the damaged property after the casualty by lightning or explosion. This policy is made and excepted in reference to the terms & conditions herein contained and hereto annexed, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to

determine the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for.

In witness whereof the said Phœnix Insurance Company have caused these presents to be signed by their president or vice-president, and attested by their secretary, in the city of Brooklyn, N. Y., county of Kings.

But this policy shall not be valid until countersigned by the authorized agent of the said Phœnix Insurance Company at Toledo.

PHILANDER SHAW, *Secretary.*
STEPHEN CROWELL, *President.*

Countersigned at Toledo this 1st day of December, 1867.
(S'g'd) SHIPHERD & SCOTT, *Agents.*

Conditions of insurance.—Classes of hazards.

35 This classification refers to buildings and their contents.

FIRST CLASS.

Not hazardous. Dwelling-houses staple, foreign and domestic dry goods in packages.

Hazardous. Agricultural improvements, belting and car springs of india-rubber or gutta-percha; boots and shoes; card printing; china or earthen ware; or glass-ware in boxes, crates, or casks; copper and sheet-iron-ware; dry goods, including cotton batts and wadding; embroideries and lace; flour; furs and peltries in packages; glass, window or plate, or looking-glasses in boxes; grocer's stock; gum shelac; gutta-percha and India-rubber manufactured; hides & leather; hops in bales; indigo; iron-ware; metals (in bars, rods, pigs, and sheets;) oil, (fish and vegetable;) paints; paper in reams; pot, pearl, and soda ash; provisions, rice, strawbraids and straw hats in packages, as imported; sail-making; spirituous liquors in casks, and in glass, in packages; sugars; sulphur; threshed grain; tailor's goods and ready-made clothing; tallow; whalebone; wine in casks, and in glass, in packages; wool.

Extra hazardous. Alcohol in bbls.; apothecaries stocks, (retail only;) artificial flowers and feathers; basket-seller's stocks; bakeries with ovens outside the buildings and using coal; basket bleaching, basket making, blacksmith shops, block and pump making, box repairing workshops, brass turning and working; also stocks of books; china or earthen ware, or glass-ware, or looking-glasses, with privilege of packing or unpacking; coffee; colormen's stocks; china, or glass, or earthen ware, or window, or plate glass, or looking-glasses unpacked; cabinet-ware, carriages, confectionary, carving, chocolate making, coopering, copper-plate printing; drugs, importer's stocks of, without inflam'able
36 acids or phosphorus; daguerreotype materials, daguerreotyping, essential oils, eating-houses, electro-plating, fire-crackers in packages; flax, fishing-tackle, furs, unpacked; feathers, fringe-making by hand-power, gum copal, gas-fixtures, gas-fitting, gildings, gold-pen making, gun repairing, hay & straw pressed in bundles; hardware and cutlery; hat ironing, hat bleaching, hemp; India-rubber goods and gutta-percha goods, India-rubber hard goods; jewelry, jewelry manufacturing; lime unslacked, in lime stores; liquors and wines in glass, unpacked; lamps, lamp manufacturing; liquor bottling establishments; lithographing; watches, stocks of on sale; musical instruments and printed music; millinery and military goods; map mounting and var-

nishing; morocco manufacturing; manilla & sisal grass and tow; oakum in bales; oiled clothing; optical and mathematical instruments; painters stock, pitch, pins and needles, paperhangings; porter houses, *pre*cussion caps, pictures and prints; precious stones, paper boxes, and band-boxes; perfumery, pocket-books; provision warehouses with brick smoke-houses attached; photographing; rags, in packages; private stables; rosin and rosin oil, ship chandlery; spirits of turpentine, salt, spices, silver-plate and plated ware; straw goods; segars, in stores and manufactories; stationery, silversmithing, teas, tar, toys, tin, or sheet-iron, or copper working; taverns, umbrella manufacturing, upholstery, varnish, (excepting nap'tha or benzine varnish;) vessels in port, their cargoes, and vessels building and repairing; wood & willow-ware; watches and watch-makers's tools.

Specially hazardous. Cotton in bales, cotton-broker's samples,
37 and all trades, occupations, and hazards, not above enumerated, are classed specially hazardous; camphene, spirit-gas "burning-fluid," phosgene, or any other inflam'able liquid, when used in stores, warehouses, shops, or manufactories as a light, subjects the goods therein to an addititional charge, and permission for such use must be endorsed in writing on the policy, otherwise the insurance shall be void.

Carpenter's or builder's risk. When buildings insured by this company are being repaired or altered, or when mechanics are working therein, or if the buildings contain property insured by this company, notice thereof must be given to the company and consent thereto endorsed on the policy.

Dry goods in windows where lights are used are not covered by this policy, unless a specific amount is stated to apply thereto. Fences and privies, also store furniture and fixtures, must be separately and specifically insured, otherwise they are not covered by this policy. Plate-glass doors or windows, when the plates are of the dimensions of three square feet or more, are subject to an extra premium, and must be separately and specifically insured, otherwise they are not covered by this policy.

Conditions of insurance continued.

1. Applications for insurance upon property must be in writing, and must specify the materials and construction of the building to be insured, or containing the property to be insured, by whom occupied, whether as a private dwelling, or how otherwise, its situation with respect to contiguous buildings, and their construction and materials, and whether any manufacturing is carried on within or about it, and in relation to the insurance of goods and merchandise, the application must state whether or not they are of the description denomi-
38. nated hazardous, extra hazardous, or specially hazardous, and such survey and description shall be taken and deemed to be a part and portion of the policy issued thereon, and a warranty on the part of the insured.

2. If any person effecting insurance in this company shall make any misrepresentation or concealment touching the risk to be assumed, or if, during the existence of the policy, or any renewal thereof, the risk shall be increased by any or by occupation of the premises for more hazardous purposes than are permitted by this policy, or if the insured, at or before the taking of any renewal, shall fail to notify the company of any increase in the hazard, whether within or without the premises, and have the same endorsed hereon, this policy shall be void. Every renewal shall be deemed to be upon the faith of the representation on

which the original policy was granted unless superseded by a new description of the risk.

3. This insurance may be terminated at any time at the request of the insured, in which case the company may retain the customary short rates for the time the policy has been in force. This policy may also be at any time terminated at the option of the company on giving notice to that effect and refunding a rateable proportion of the premium for the unexpired term of the policy.

4. If the property to be insured be held in trust or on commission, or be a lease-hold or other interest not absolute, it must be so represented to the company and expressed in this policy in writing, or otherwise the insurance as to such property shall be void; and in case of loss the names of the representative owners shall be set forth in the preliminary proofs of such loss, with their respective interests therein, and the assur'd's obligation to be liable therefor, or to keep the same insured. Goods held on storage must be separately and specifically insured.

5. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.

6. Reinsurance for any other company to be on the basis of joint liability with said company, and in the event of loss, this company to pay pro rata, at and in the same time and manner as the company reinsured. If claim shall be made against this company by a mortgagee, holding this policy as collateral security, and this company shall pay the same, and claim that as to the mortgagor or owner no liability existed, this company shall at once be legally subrogated to all the rights of the mortgagee under all the securities held as collateral to the mortgage debt to the extent of such payment, or at its option may pay the mortgagee the whole principal due, or to become due on the mortgage, with interest, and shall therefrom receive a full assignment and transfer of the same and all other securities held as collateral to the mortgage debt, and whenever this company shall pay any loss, the assured agrees to assign over all his rights to recover satisfaction therefor from any other person or persons, town, or other corporation, or to prosecute therefor at the charge and for the account of the company if requested.

7. If at the happening of any fire, the assured shall have insurance under a floating policy or policies, not specific, but covering goods generally in various places not designated and yet within limits, which include the premises or property herein insured, such policy as between the insured and this company, shall be considered as coinsurance with this policy, anything in the floating policy to the contrary notwithstanding.

8. In case of claim for loss or damage on a policy assigned, where there is no actual sale or transfer of the property insured, proofs of loss shall be made by the insured in conformity with the conditions of this policy in like manner as if no assignment had been made, otherwise this policy shall be void and of no effect whatever, and all liability on the part of the company shall cease.

9. In case of fire, or loss or damage thereby, or exposure to loss and damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property, and if they fail so to do, this company shall not be held liable to make good the loss and damage, sustained in consequence of such neglect, and it is mutually understood that there can be no abandonment to the insurers of the subject insured.

10. Persons sustaining loss or damage by fire shall forthwith give

notice thereof in writing to the company or its agent, and as soon after as possible they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed with their own hands; and they shall accompany the same with their oath or affimation, declaring the said account to be true and just; showing also the ownership of the property insured, what other insurance existed, if any, on the same property, and give a copy of the written portion of the policy of each company, and what was the whole cash value of the property insured; what was their interest therein; in what general manner (as to trade, manufactory, merchandise, or otherwise,) the said building insured or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated, so
41 far as they know or believe. They shall also produce a certificate under the hand and seal of a magistrate, notary public, or commissioner of deeds, most contiguous to the place of the fire, and not concerned in the loss as creditor or otherwise, or related to the insured or sufferers, stating that he has examined the circumstances attending the fire, loss, or damage alleged; that he is acquainted with the character and circumstances of the insured or claimants; and that he verily believes that he, she, or they have, by misfortune, and without fraud or evil practice, sustained loss and damage to the amount of which said magistrate, notary public, or commissioner of deeds, shall certify. When merchandise or other property is partially damaged, the insured shall forthwith cause it to be put in as good condition as the nature of the case will admit, assorting and arranging the various articles according to their kind, separating the damaged from the undamaged, and causing a list or inventory to be made and furnished to the company, of the whole, naming the quality and cost of each. In case differences shall arise concerning the amount of loss, the amount of sound value and of damage shall then be ascertained by the examination and appraisal of each article, by disinterested appraisers, mutually agreed upon, one-half of the appraisers fees to be paid by the insurers. And the insured shall, if required, submit to an examination under oath by the agent or attorney of the company, and shall answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, or to their claim thereupon, and subscribe such examination, the same being reduced to writing; and whenever required in writing the insured shall produce and exhibit his books of account and other
42 vouchers to the insurers or their agents, at the office of this company, in support of his claim, and permit extracts and copies thereof to be made; and shall also produce certified copied of any bills or invoices of property destroyed or damaged, the originals of which may have been lost or mislaid or destroyed, and shall also exhibit to any persons named by the company, and shall permit to be examined by them any property damaged on which any loss is claimed, or any property saved which was insured by this policy; and until such proofs, declarations, and certificates are produced, and such appraisals and examinations of property permitted by the claimant, the loss shall not be payable. All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company, under this policy.

11. In case of any loss or damage to the property insured, it shall be optional with the company to replace the articles lost or destroyed with others of the same kind and quality, or to take the goods at their appraised value, or to rebuild, or repair the building or buildings, within

a reasonable time, giving notice of their intention so to do, within thirty days after having received the preliminary proofs required in the 9th article of these conditions; and the assured shall, if required, furnish plans and specifications of the building or other property destroyed. In case differences shall arise concerning the amount of any loss or damage by fire, the matter shall, at the written request of either party, be submitted to the judgment of arbitrators, indifferently chosen, whose award in writing as to the amount of such loss and damage, shall
43 be binding on the parties, but such award shall not determine any question as to the liability of this company under this policy.

12. This company will not be answerable for any loss or damage arising from the use of fires in buildings unprovided with a good and substantial stone or brick chimney, or in consequence of neglect of or deviation from the laws or regulations of police, made to prevent accidents from fires in places where laws and regulations on this subject exist.

13. It is furthermore hereby expressly provided, that no suit or action of any kind against said company for the recovery of any claim upon, under, or by virtue of this policy shall be sustainable in any court of law or chancery unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur, and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

The plaintiffs also gave in evidence the written agreement for a dissolution of the partnership of Hamilton & Cook, dated July 1, 1867, which was referred to in said agreed statement, and marked "B," and which was in the following words, to wit:

Articles of agreement between Vincent Hamilton & Josiah D. Cook, made and entered into this 1st day of July, A. D. 1861, witnesseth:

1st. The said Vincent Hamilton, in consideration of the premises hereinafter mentioned, hereby sells, assigns, and conveys to the said Josiah D. Cook, his heirs and assigns, all his interest, of any and every kind, in and to all property, real and personal, all choses in action,
44 all claims and assets of all kinds belonging to the firm of Hamilton & Cook, as partnership property, hereby intending to convey to said Cook and invest in him all of said partnership property in his own right.

Second. And in consideration of the above sale and conveyance, the said Josiah D. Cook hereby covenants and agrees with the said Vincent Hamilton, his heirs and assigns, that he will pay and cancel and adjust all claims against said partnership *if* any and all kinds, and save the said Vincent Hamilton harmless from all payment, expense, and loss in regard to the same, except two certain claims, as follows: The first in favor of R. C. Hamilton, of Sturgis, Michigan, of about $8,200; the second in favor of Augustus Hamilton, of Lavonia, New York, for about the sum of $4,100, which claims or debts it is expressly agreed shall be paid entirely by said Vincent Hamilton, and which he hereby assumes and agrees to pay.

The partnership heretofore existing between the parties hereto is this day dissolved by mutual consent.

VINCENT HAMILTON.
JOSIAH D. COOK.

The plaintiffs then produced Josiah D. Cook, one of the plaintiffs, as a witness, who testified that, at the time of the dissolution, no time was fixed upon for publication of the notice of dissolution, but Hamilton proposed that I might run the business in the firm-name until Jan. 1 unless he went to California before that time. I don't remember what answer I made to his proposition, but I was much obliged to him, as the firm had a good business prestige, and it was for my interest not to change the firm in the business season. I accepted, however. Mr. Hamilton agreed to remain in the office while he was in Toledo. If he operated he was to do it in the firm-name. And he said that he would leave his
45 money there. His own transactions were to run through the books. He did do about as I have stated. He bought wheat in the firm-name on his own account, and in my absence acted in the business of the firm. He wrote letters to the customers of the firm. Warehouse receipts were taken in the name of the firm. Mr. Bellman effected insurance on his grain in the name of the firm as he did for other grain held in the firm-name. Loans were made at the banks before July 1st. No change was made after July 1st in the manner of doing banking business. Hamilton made the checks in the name of Hamilton & Cook, both on his own account and the firm account. All insurance was effected with Mr. Scott, as agent, after July 1. I made no statement after July 1 to Scott as to who composed the firm of Hamilton & Cook. I had no care or custody of the grain. The railroad company gave us the privilege of examining the grain, but it had the care of it. It was delivered by the company only on the surrender of the receipts. Hamilton had the same access to the books after as before the dissolution.

On cross-examination the witness said:

I and Hamilton had been in partnership about three years. Previous that we were in partnership with another person from 1861. The partnership was dissolved July 1, 1867. After that Hamilton had no interest in the business. I alone was interested after that date. I alone had the profits and sustained the losses. The contract of dissolution was made at Toledo. It was in writing, and expresses what was agreed to. The writing is not as I instructed the attorney to draw it up. We had agreed to go on in the firm-name, and the attorney said it was not necessary to put that in. The conversation as to the use of the
46 firm-name was about the time of the dissolution. It was in our office. I don't remember the whole conversation. There was more or less conversation in regard to it before we came to an agreement. After we had agreed upon terms, Mr. Hamilton said it would be better for me to let the old firm-name run on until he went to California or until Jan. 1. I don't remember the particulars of the conversation further than that I assented to it, and was very much obliged to him. I took it as a kindness on his part. Mr. Hamilton stated that he was going to be there and would stay in the office, and if he operated at all he would do it in the firm-name. He was on 'change every day and bought and sold for my customers in the name of the firm. He did business for himself buying and selling grain in the name of Hamilton and Cook. His wheat was all kept in the name of the firm. I kept all the receipts and gave him credit on the books the same as any other customer of the firm. I had no interest in that wheat. All the individual transactions of his that I remember were kept in that way. There were times, I think, when I advanced money on his wheat, the same as other customers. I cannot tell whether I had any advances on the wheat at the time of the fire. I had a little balance of wheat of my

own property. It was about 17 bushels. All the rest of the wheat was held by me on commission. In this I was only interested to the extent of my commissions and advances. Wheat was being received all the time. Part was received before and a part after the insurance was effected, I am inclined to think, but can't be positive. Whatever wheat Hamilton bought, not on his own account, was for my customers, and in so
47 doing he acted for me. An account was kept at the bank. Money was borrowed, and the business was continued in the same name after the dissolution as before. Sometimes Hamilton went to the bank, and sometimes I did. He did banking business for me. I don't know that he raised money for me at any time. He drew checks. We sometimes borrowed money from the bank on checks. The money was advanced by the bank, with wheat receipts as collateral. The money in the bank stood in the name of Hamilton & Cook. All I mean to say is that the firm-name of Hamilton & Cook was suffered to run on for my benefit after the dissolution. No such firm in fact existed after July 1. I was not present when the policy was issued, and have no knowledge of what representations were made at the time.

On re-examination, witness said:

Hamilton staid in the office until after the fire; the wheat I had was the accumulation of odds and ends in the business; I think I bought and sold no grain on my own account; I purchased all in the name of Hamilton & Cook; the railroad company gives receipts for grain in the elevator; the ownership of the grain is transferred by transfer of these receipts; all of the receipts were taken in the name of Hamilton & Cook; to obtain wheat from the elevator, the receipts are surrendered to the company, and a delivery-order obtained; money is raised at the bank on note or check, and receipts given as collateral; the name of Hamilton & Cook was given to raise this money.

The plaintiffs also produced VINCENT HAMILTON, one of the plaintiffs, as a witness, who testified that, upon the dissolution of the partnership of Hamilton & Cook, there was a mutual understanding between
48 himself and Cook that the business was to run on in the name of Hamilton & Cook, until he went to California, or until Jan. 1. Business was transacted in the name of Hamilton & Cook until Jan. 1st; notice of dissolution was published Jan. 1st; I did, after July 1, about as I had done before, made checks, &c.; and when Cook was absent, I carried on the correspondence with the customers in the name of Hamilton & Cook; I staid at the office, and had no other place of business; all my own transactions were in the name of Hamilton & Cook; my account was kept on the books of Hamilton & Cook; all my business was transacted in the name of Hamilton & Cook; my warehouse receipts were kept in the office of Hamilton & Cook, with their other receipts; when I had grain, I had credit per ct. on their books; my grain was insured the same as the other grain; no representations were made by me or Cook as to who constituted the firm of Hamilton & Cook; I had nothing to do with the care of the grain in the house, but I had care of the receipts, the same as I always had.

On cross-examination, he said:

I had no interest, only in name; I had no pecuniary interest; had nothing to do with the profits or losses, only so far as my own grain was concerned; Cook had no interest in my grain; the conversations about continuing the firm-name took place in the office about the time of our agreement to dissolve; I don't know that I can relate it as it took place,

but there was a mutual agreement that the name of the firm should run on as it did before; I told Mr. Cook that if he wished it, the firm-name might run on until Jan. 1, or while I staid there; I was going to
49 operate, and he agreed that he would do my business without any charge; I had no concern, after July 1, in any of the business done by him; by that I mean that I had no interest in it; after same time he had no interest in the business done by me for myself; but I did business in the name of Hamilton & Cook for him; as a matter of accommodation I did business for him; the partnership was dissolved July 1; he was after that to continue business in our name; I made no disclosure of the fact of our dissolution, not even to our customers; none ever asked me, and I never told any one; I was not present when the insurance was taken, and cannot say what representations were made; all the grain I had at the time of the fire stood in the name of Hamilton & Cook, and to my credit on the books.

On reëxamjnation, he said that he had a brother dealing with the firm before the dissolution, and he continued to do business with the firm afterwards. I kept no separate bank account; all my money was kept in the name of the firm, and charged and credited to me on the books of the firm.

The plaintiffs also produced Walter C. Scott as a witness, who testified that he was, at the time the insurance was effected, the agent of six or seven insurance companies; no questions were asked by him as to who composed the firm; it was customary to give insurance to any one who asks for it; no one told me who composed the firm; it was customary for me to go to the office of the plaintiffs each day after supper, and enquire about insurance: I went to Bellman; he had charge of the receipts; Hamilton & Cook had nothing to do with the care of the grain; that was with the railroad company, and was so known to me when the insurance was effected.

On cross examination, he said that he had known Hamilton &
50 Cook ten years; I did know, from reputation, who composed the firm, & had no notice of any dissolution; I supposed they were really together as partners.

And thereupon the plaintiffs withdrew all claim to recover for grain belonging to Vincent Hamilton & Josiah D. Cook, individually, and rested their case.

The above and foregoing was all the evidence given to the jury by either of the partys in the case, and thereupon the defendant, by its counsel, requested the court to instruct the jury "That if the jury should find, from the evidence submitted to them, that the defe... nt had dealt with the plaintiffs by insuring their property while they were actually doing business together as partners, and that the policy sued upon in this action was issued to Cook after such partnership was dissolved, and Hamilton had no further interest in the business of Hamilton & Cook, and without any disclosure on his part that the partnership had been dissolved, the agent of the company supposing it still to continue, the fact that he made such application in the name of the former partnership, and concealed the fact that had previously been dissolved, and that Hamilton had no interest in the business or the property insured, is such a misrepresentation and concealment as will avoid the policy."

Which instruction the court refused to give to the jury: To which ruling and decision of the court in refusing to give the instruction so requested, the defendant then and there, in open court during the trial, excepted, and prayed that its exception might be allowed by the court,

and made a part of the record of the case, which was done and ordered accordingly.

And the defendant, by its counsel, requested the court further
51 to instruct the jury, "That upon the facts stated in the first request, it would make no difference that Cook continued to do the business, being alone interested therein, in the name of Hamilton & Cook, with the assent of said Hamilton, and in pursuance of an agreement with said Hamilton that it should continue to be done in the names of Hamilton & Cook, and that under such circumstanees no recovery can be had in the present action."

Which instruction the court refused to give to the jury. To which ruling and decision of the court in refusing to give the instructions so requested, the defendant then and there, in open court during the trial, , and prayed that its exception might be allowed by the court and made a part of the record of the case, which was then and there done and ordered accordingly.

And the defendant, by its counsel, further requested the court to instruct the jury "That if, under the proofs, they should find that the wheat held by Cook on commission was received from customers in the name of Hamilton & Cook under the circumstances stated in the agreed statement of facts, yet there can be no recovery in this action unless the same was actually held by Hamilton & Cook, jointly and upon joint account. If Hamilton simply suffered his name to be used by Cook, and had no interest in or control over the business or the property, he had no such joint interest in the property as would fall within the provisions of the policy, and could suffer no joint damage for which this action can be maintained."

Which instruction the court refused to give to the jury. To which ruling and decision of the court in refusing to give the instruction so requested, the defendant then and there, in open court during the trial, excepted, and prayed that its said exception might be allowed by
52 the court, and made a part of the record of the case, which was then and there done and ordered accordingly.

And the defendant, by its counsel, still further requested the court to charge the jury "That, if the plaintiffs are entitled to recover, they cannot recover damages beyond the proper proportion of the defendant, having reference to other insurances upon the property, of the advances made by Hamilton & Cook or Cook alone upon the property, and the commissions due thereon, and not for the whole value of the property. A recovery can only be had for the interests of Hamilton & Cook, or one of them, in the property, and not for the interests of the persons for whom the property was held."

Which instructions the court refused to give to the jury. To which ruling and decision of the court in refusing to said instructions as requested, the said defendant then and there, in open court during the trial, excepted, and prayed that its said exception might be allowed by the court and made a part of the record in the case, which was then and there done and ordered accordingly.

And thereupon the plaintiffs, by their counsel, requested the court to charge the jury "That if they believe that said Hamilton & Cook mentioned in the policy of insurance are Vincent Hamilton and Josiah D. Cook, the plaintiffs, and that there was in said elevator building, at the time of said fire, grain which had been placed there in the name of Hamilton & Cook, and that the owners of said grain had, either expressly or by the usages of trade, authorized said Hamilton & Cook to insure the same for their benefit, the plaintiffs are entitled to recover,

for the benefit of said owners, the value of said grain at the time of said loss."

53 Which instructions, so requested by the plaintiffs, the court gave in charge to the jury. To which ruling and decision of the court in so giving said instructions to the jury, the defendant then and there, in open court during the trial, excepted, and prayed that its said exception might be allowed by the court and made a part of the record of the case, which was then and there done and ordered accordingly.

And the said plaintiffs, by their counsel, further requested the court to charge the jury "That if the jury find that, at the time of the making of said writing of dissolution, said Hamilton & Cook verbally agreed that said business conducted by them as partners prior to said first day of July was thereafter to be continued by said Cook in the name of Hamilton & Cook, and that said verbal contract was carried into effect, and that said contract of insurance was effected by said Cook, in the course of the prosecution of said business, upon grain which had been received by him in the name of Hamilton & Cook, under said agreement, plaintiffs are entitled to recover from defendant the value of the grain lost, for the use and benefit of the owners of said grain."

Which instructions, so requested by the plaintiff, the court also gave in charge to the jury. And to which ruling and decision of the court in so giving said instructions to the jury, the defendant then and there, in open court during the trial, excepted, and prayed that its said exception might be allowed by the court and made a part of the record of the case, which was then and there done and ordered accordingly.

And the said plaintiffs, by their counsel, further requested the court to charge the jury "That if the jury find that no representations were made to defendant with regard to individuals composing the firm

54 of Hamilton & Cook, there was no misrepresentation which can avoid said policy."

Which instructions, so requested by the plaintiffs, the court also gave in charge to the jury. And to which ruling and decision of the court in so giving said instructions to the jury, defendant then and there, in open court during the trial, excepted, and prayed that its said exception might be allowed by the court and made a part of the record in the case, which was then and there done and ordered accordingly.

And the said plaintiffs further requested the court to charge the jury "That if the jury find that said Hamilton & Cook had no actual care or custody of the grain in said elevators, but that the same, so far as regarded its preservation against fire, was entirely in the control of said railroad company, and so understood by the defendant's agent when said policy & contract of insurance was executed, the omission by plaintiffs to notify defendant of said agreement of dissolution cannot be considered a concealment which will avoid the policy."

Which instruction, so requested by the plaintiffs, the court gave in charge to the jury. And to which ruling and decision of the court in so giving said instruction to the jury, the defendant then and there, in open court during the trial, excepted, and prayed that its said exception might be allowed by the court and made a part of the record in the case, which was then and there done and ordered accordingly.

Whereupon the counsel for the said defendant, inasmuch as the rulings and decisions aforesaid do not appear by the record in the case, prayed that the judge holding said court would set his hand and seal to this bill of exceptions, containing the several rulings and decis-

55 ions so excepted to as aforesaid, and order the same to be made a part of the record of the case.

And, thereupon, at the request of the said counsel for the defendant, in accordance with the law and practice of this court, the said judge did then and there, in open court, during said term, and before the entry of judgment upon the verdict, sign and seal this bill of exceptions, and order the same to be made a part of the record of the case.

(Signed) C. T. SHERMAN, *Judge.* [SEAL.]

Judgment.

And afterward, to wit, at the September term of said court, to wit, on the 28th day of December, A. D. 1869.

In this cause the jury heretofore, to wit, on the 19th day of October, A. D. 1869, having found a verdict for the plaintiffs, and assessed their damages to the sum of $9,971 16; thereupon the said defendant filed its bill of exceptions to the ruling of the court on the trial, and to the charge of the court, signed and sealed by the court, and filed herein, and the same is made a part of the record.

And this cause coming on to be heard upon the motion of the said defendant to set aside the verdict, and for a new trial, was argued by counsel. On consideration whereof, it is ordered by the court that the said motion be, and the same is hereby, overruled with costs. It is therefore considered by the court that the said plaintiffs recover of the said defendant the said sum of nine thousand nine hundred and seventy-one dollars and sixteen cents, damages aforesaid, in form aforesaid assessed, and also their costs in this behalf expended, taxed to $

56

57 THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

It is hereby certified that the foregoing is truly taken and copied from the record of the proceedings of the circuit court of the United States for the northern district of Ohio aforesaid.

Witness my officieal signature, and the seal of said circuit court, at Cleveland, in said district, this 14th day of January, 1870.

[SEAL] EARL BILL,
Clerk of said Circuit Court.

(Indorsed:) No. 1807. United States circuit court for the northern district of Ohio. Vincent Hamilton et al. vs. The Phœnix Insurance Company of Brooklyn, New York. Exemplification of record.

(Indorsement on cover:) No. 351. The Phœnix Insurance Company of Brooklyn, New York, plaintiff in error, vs. Vincent Hamilton and Josiah D. Cook. N. Ohio C. C. U. S. Filed 7th December, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 150.

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, N. Y.,

Plaintiff in Error,

vs.

VINCENT HAMILTON AND JOSIAH D. COOK.

BRIEF FOR PLAINTIFF IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

SUPREME COURT OF THE UNITED STATES.

THE PHŒNIX INSURANCE COMPANY,
Plaintiff in Error,

vs.

VINCENT HAMILTON AND JOSIAH D. COOK,
Defendants in Error.

ERROR TO CIRCUIT COURT FOR NORTHERN DISTRICT OF OHIO.

BRIEF AND POINTS FOR PLAINTIFF IN ERROR.

	Trans. Page.	Folio.
Declaration in Assumpsit	5	4
1st Count	5	4–8
2d Count	7	8–25
Plea Non-Assumpsit	16	26
Trial and Verdict for Plaintiffs (Defendants in Error)	16	26–27
Motion for New Trial, and the Grounds	17	27
Bill of Exceptions	17	27
Evidence by Plaintiffs:		
Agreed Statement of certaint Facts proved	17	28–31
Policy	19	31–4
Agreement for Plaintiffs' Dissolution	25	43–4x
Testimony of Plaintiff Cook	26	44–47
" " Hamilton	27	47–49
" Scott, Defendants' Agent	28	49–50
Plaintiffs' withdraw Individual Claim	28	50
Above is all the Evidence.		
Defendants' request for Instructions and Exceptions	28	
1st Request and Exception		50
2d and 3d Request and Exception		51
4th Request and Exception		52
Instructions and Exceptions	29	
1st Instruction and Exception		52–53
2d and 3d Instruction and Exception		53
4th Instruction and Exception		54
Motion to set aside Verdict and for New Trial denied, and Judgment for $9,971.16, besides costs	31	55

ABSTRACT.

Omitting matters about which no question is presented in the bill of exceptions, the declaration in each count avers an insurance by th defendant of "the plaintiffs by name, firm and description of Hamilton & Cook," for the period between the first and thirty-first days of December, 1867, to the amount of ten thousand dollars, against loss or damage by fire on grain in store, in a place known as Michigan Southern Elevator A, "the *property* of the *plaintiffs*, or *held* by *plaintiffs* on trust or on commission, or sold by *plaintiffs* and not delivered;" "other insurance allowed," and in case of loss defendant to be liable in a prescribed ratio of whole insurance to whole loss; that during the term there was in store at the designated place a large quantity of grain, the property of different persons in different respective amounts, as owners in common, giving the names of such owners and the quantity owned by each, and the aggregate of the whole. "And the plaintiffs say that all the said grain was then and there *held by said plaintiffs*, under their name, firm and description aforesaid, *in trust*, for the respective owners;" and that, "all of said grain," except certain specified quantities belonging severally to Hamilton & Cook respectively, "was then and there *held by the plaintiffs* in their name, firm and description, aforesaid, *on commission*." That on the 21st December, the elevator was destroyed by fire, destroying or injuring the whole of said grain and doing great specified damage; that there was at the time on said grain other insurance to the amount of $19,000, and that by reason of such other insurance, the defend ant's proportionate loss was in one count $10,000, and in the other $9,853.63, which last sum the plaintiffs had duly demanded and been refused, "to the damage of *plaintiffs* of $15,000, and therefore, *they* bring their suit."

At the trial the plaintiffs gave in evidence the following agreed statement of facts, (omitting title and signatures).

Agreed statement upon the trial of the above cause.

It is admitted that the following facts are proved:

On the first day of December, A. D. 1867, defendant, by its agent at Toledo, executed the policy hereunto annexed, marked "A." Prior to the first day of July, 1867, plaintiffs were partners at Toledo, as grain commission merchants, under the firm-name of Hamilton & Cook. By the general usage of business of grain commission merchants at Toledo, all grain consigned there was insured by the consignee for the benefit of the consignor, while the same remained in store in said city, in all cases where the consignor gave no directions to the contrary. The business of said firm was conducted in accordance with said custom, their contracts of insurance being generally effected through their book-keeper, Mr. Bellman, who had full authority from said partners to act in their said behalf. On the first day of July, A. D. 1867, plaintiffs executed the agreement for a

dissolution of their said partnership, marked "B." No notice was given of said dissolution until the first day of January, 1868, nor was any change made whatever in the conduct of said business, from which parties theretofore dealing with said firm could infer said dissolution, said business continued to be transacted from said first day of July to said first day of January, by said Josiah D. Cook, in said firm-name of Hamilton & Cook, and for his own benefit, the said Cook having all the profits and paying all the losses consequent thereon, and controlling the whole business. The books theretofore kept by said firm were continued without change, and were kept by said Bellman. An account was kept on said books of transactions in which Hamilton was individually interested, the same as any customer, except that no commissions were charged. On the said first day of December, A. D. 1867, said agent of defendant applied to said Bellman at the place of business aforesaid, and asked him how much insurance he wanted. He replied, ten thousand dollars, upon grain in Elevator A. Whereupon said agent executed said policy and delivered the same to said Bellman. No notice was given defendant or its agents of said agreement of dissolution of July first. At the time of executing said policy said agent supposed plaintiffs to be partners, and delivered said policy to said Bellman as their agent. The title to grain in the said elevator building was evidenced by warehouse receipts or grain orders, issued by said railroad company. The care and custody of said building, and the grain therein contained, devolved entirely upon the agents and employees of said Michigan Southern and Northern Indiana Railroad Company.

On the night of the 21st of December, 1867, said elevator building was burned. There was in said building at the time of said fire the wheat mentioned in the second count of plaintiffs' declaration, less its proportion, if any, of grain subsequently ascertained to have been abstracted by the employees of said railroad company, subsequently paid for by said company, and accounted for to defendants by plaintiffs as so much salvage. All of said wheat belonged to the owners mentioned in the second count of plaintiffs' declaration in the respective amounts therein stated. All of said owners, other than the said Hamilton and the said Cook, were customers and correspondents of said firm of Hamilton & Cook prior to said first day of July, A. D. 1867. None of them had, prior to said fire, received any notice of said agreement of dissolution. None of them had ever notified said Hamilton & Cook not to insure their grain, but all had either given express instructions to insure, or had settled accounts *accounts* with Hamilton & Cook in which insurance was charged without objection. All of said grain was shipped by said owners to said Hamilton & Cook, at Toledo, to be held by said Hamilton & Cook, as factors and commission merchants, at Toledo, on account of said owners, without any knowledge of the said owners of any change in the partnership relations existing between said plaintiffs. The warehouse receipts for all of said grain were taken in the name of Hamilton & Cook, and were held by said Cook, doing business under said name of Hamilton

& Cook. Said Cook, under the name of Hamilton & Cook, had, at the date of said fire, advanced to and for the owners of the said grain, on account thereof, including interest, the sum of $13,387 10, which constituted a lien upon said property. Defendant is willing to admit that the value of said wheat at the time of said fire was $34,214.01; that the amount of storage was $146.59, and the value of the property saved was $4 795.77, and that if defendant is liable for its proportion of all of said grain lost, judgment is to be entered against it for $9,442.46, with interest from April 9th, 1868, and that the value of said grain belonging to said Hamilton & Cook individually was $2.57 per bushel, less 14 $\frac{17}{1000}$ p. cent. thereof for salvage. In case plaintiffs desire to prove any of said valuations too low, they are at liberty to do so. Defendant makes no objections to the proofs of loss furnished by plaintiffs; nor does it claim that plaintiffs violated any of the covenants or conditions on the part of plaintiffs by said policy to be performed, except as hereinafter stated, or as may be implied in law from the facts hereinbefore stated. As to all matters not herein admitted as proven, either party is at liberty to offer evidence upon the trial, it being expressly understood that nothing herein contained is to bar plaintiffs of the right to prove at the trial that the conduct of said business as aforesaid, after said first day of July, A. D. 1867, was in pursuance of an agreement between said Hamilton and said Cook, made on or about the date last aforesaid.

Also, the policy in question, of which the material parts are as follows:

"By this policy of insurance the Phœnix Insurance Company of Brooklyn, N. Y., in consideration of sixty dollars to them paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, do insure Hamilton & Cook against loss or damage by fire to the amount of ten thousand dollars on grain, in store Michigan Southern Elevator A, their own, or held by them in trust or on commission, or sold and not delivered. Other insurance permitted. And The Phœnix Insurance Company above named, for the consideration aforesaid, do hereby promise and agree to make good unto the said assured, their executors, administrators or assigns, all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property as above specified during thirty days, to wit, from the first day of December, one thousand eight hundred and sixty-seven, (at twelve o'clock at noon,) until the thirty-first of December, one thousand eight hundred and sixty-seven, (at twelve o'clock at noon,) the said loss or damage to be estimated according to the actual cash value of the said property at the time the same shall happen, and to be paid within sixty days after due notice and proof thereof, made by the assured in conformity to the conditions annexed to this policy: * * * Provided, always, and it is hereby declared that * * * if the said property shall be sold or conveyed, or the interest of the parties therein changed, or if this policy shall be assigned with-

out the consent of the company obtained in writing hereon, or if the insured shall make any attempt to defraud the company, then, and in every such case, this policy shall be null and void. The commencement of foreclosure proceedings or the levy of an execution shall be deemed an alienation of the property. * * * In case of loss the insured shall not be entitled to demand or recover on this policy any greater proportion of the loss or damage sustained to the subject insured than the amount hereby insured shall bear to the whole amount insured (whether the same shall be valid or not), on the said property; * * * This policy is made and excepted in reference to the terms and conditions herein contained and hereto annexed, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for. * * *

"If any person effecting insurance in this company shall make any misrepresentation or concealment touching the risk to be assumed, * * * this policy shall be void. * * * All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company, under this policy."

Also the material parts of the agreement of dissolution, as follows:

Articles of agreement between Vincent Hamilton and Josiah D. Cook, made and entered into this 1st day of July, A. D. 1861, witnesseth:

1st. That said Vincent Hamilton, in consideration of the premises hereinafter mentioned, hereby sells, assigns, and conveys to the said Josiah D. Cook, his heirs and assigns, all his interest, of any and every kind, in and to all property, real and personal, all choses in action, all claims and assets of all kinds belonging to the firm of Hamilton & Cook, as partnership property, hereby intending to convey to said Cook and invest in him all of said partnership property in his own right. * * *

The partnership heretofore existing between the parties hereto is this day dissolved by mutual consent.

VINCENT HAMILTON.
JOSIAH D. COOK.

Also the evidence of Cook, Hamilton and Scott, called for plaintiffs.

The plaintiffs then produced Josiah D. Cook, one of the plaintiffs, as a witness, who testified that, at the time of the dissolution, no time was fixed upon for publication of the notice of dissolution, but Hamilton proposed that I might run the business in the firm-name until Jan. 1 unless he went to California before that time. I don't remember what answer I made to his proposition, but I was much obliged to him, as the firm had a good business prestige, and it was for my interest not to change the firm in the business season. I accepted,

however. Mr. Hamilton agreed to remain in the office while he was in Toledo. If he operated he was to do it in the firm-name. And he said that he would leave his money there. His own transactions were to run through the books. He did do about as I have stated. He bought wheat in the firm-name on his own account, and in my absence acted in the business of the firm. He wrote letters to the customers of the firm. Warehouse receipts were taken in the name of the firm. Mr. Bellman effected insurance on his grain in the name of the firm as he did for other grain held in the firm-name. Loans were made at the banks before July 1st. No change was made after July 1st in the manner of doing banking business. Hamilton made the checks in the name of Hamilton & Cook, both on his own account and the firm account. All insurance was effected with Mr. Scott, as agent, after July 1. I made no statement after July 1 to Scott as to who composed the firm of Hamilton & Cook. I had no care or custody of the grain. The railroad company gave us the privilege of examining the grain, but it had the care of it. It was delivered by the company only on the surrender of the receipts. Hamilton had the same access to the books after as before the dissolution.

On cross-examination the witness said:

I and Hamilton had been in partnership about three years. Previous to that we were in partnership with another person from 1861. The partnership was dissolved July 1, 1867. After that Hamilton had no interest in the business. I alone was interested after that date. I alone had the profits and sustained the losses. The contract of dissolution was made at Toledo. It was in writing, and expresses what was agreed to. The writing is not as I instructed the attorney to draw it up. We had agreed to go on in the firm-name, and the attorney said it was not necessary to put that in. The conversation as to the use of the firm-name was about the time of the dissolution. It was in our office. I don't remember the whole conversation. There was more or less conversation in regard to it before we came to an agreement. After we had agreed upon terms, Mr. Hamilton said it would be better for me to let the old firm name run on until he went to California or until Jan. 1. I don't remember the particulars of the conversation further than that I assented to it, and was very much obliged to him. I took it as a kindness on his part. Mr. Hamilton stated that he was going to be there and would stay in the office, and if he operated at all he would do it in the firm name. He was on 'change every day and bought and sold for my customers in the name of the firm. He did business for himself buying and selling grain in the name of Hamilton & Cook. His wheat was all kept in the name of the firm. I kept all the receipts and give him credit on the books the same as any other customer of the firm. I had no interest in that wheat. All the individual transactions of his that I remember were kept in that way. There were times, I think, when I advanced money on his wheat, the same as other customers. I cannot tell whether I had any advances on the wheat at the time of

the fire. I had a little balance of wheat of my own property. It was about 17 bushels. All the rest of the wheat was held by me on commission. In this I was only interested to the extent of my commissions and advances. Wheat was being received all the time. Part was received before and part after the insurance was effected, I am inclined to think, but can't be positive. Whatever wheat Hamilton bought, not on his own account, was for my customers, and in so doing he acted for me. An account was kept at the bank, money was borrowed, and the business was continued in the same name after the dissolution as before. Sometimes Hamilton went to the bank and sometimes I did. He did banking business for me. I don't know that he raised money for me at any time. He drew checks. We sometimes borrowed money from the bank on checks. The money was advanced by the bank, with wheat receipts as collateral. The money in the bank stood in the name of Hamilton & Cook. All I mean to say is that the firm-name of Hamilton & Cook was suffered to run on for my benefit after the dissolution. No such firm in fact existed after July 1. I was not present when the policy was issued, and have no knowledge of what representations were made at the time.

On re-examination, witness said :

Hamilton staid in the office until after the fire; the wheat I had was the accumulation of odds and ends in the business; I think I bought and sold no grain on my own account; I purchased all in the name of Hamilton & Cook; the railroad company gives receipts for grain in the elevator; the ownership of the grain is transferred by transfer of these receipts; all of the receipts were taken in the name of Hamilton & Cook; to obtain wheat from the elevator, the receipts are surrendered to the company, and a delivery-order obtained; money is raised at the bank on note or check, and receipts given as collateral; the name of Hamilton & Cook was given to raise this money.

The plaintiffs also produced VINCENT HAMILTON, one of the plaintiffs, as a witness, who testified that, upon the dissoluion of the partnership of Hamilton & Cook, there was a mutual understanding between himself and Cook that the business was to run on in the name of Hamilton & Cook, until he went to California, or until January 1. Business was transacted in the name of Hamilton & Cook until Jan. 1st; notice of dissolution was published Jan. 1st; I did, after July 1, about as I had done before, made checks, &c., and when Cook was absent I carried on the correspondence with the customers in the name of Hamilton & Cook; I staid at the office, and had no other place of business; all my own transactions were in the name of Hamilton & Cook; my account was kept on the books of Hamilton & Cook; all my business was transacted in the name of Hamilton & Cook; my warehouse receipts were kept in the office of Hamilton & Cook, with their other receipts; when I had grain, I had credit per ct. on their books; my grain was insured the same as the other

grain; no representations were made by me or Cook as to who constituted the firm of Hamilton & Cook; I had nothing to do with the care of the grain in the house, but I had care of the receipts, the same as I always had.

On cross-examination, he said:

I had no interest, only in name; I had no pecuniary interest; had nothing to do with the profits or losses, only so far as my own grain was concerned; Cook had no interest in my grain; the conversations about continuing the firm name took place in the office about the time of our agreement to dissolve; I don't know that I can relate it as it took place, but there was a mutual agreement that the name of the firm should run on as it did before; I told Mr. Cook that if he wished it, the firm name might run on until Jan. 1, or while I staid there; I was going to operate, and he agreed that he would do my business without any charge; I had no concern, after July 1, in any of the business done by him; by that I mean that I had no interest in it; after same time he had no interest in the business done by me for myself; but I did business in the name of Hamilton & Cook for him; as a matter of accommodation I did business for him; the partnership was dissolved July 1; he was after that to continue business in our name; I made no disclosure of the fact of our dissolution, not even to our customers; none ever asked me, and I never told any one; I was not present when the insurance was taken, and cannot say what representations were made; all the grain I had at the time of the fire stood in the name of Hamilton & Cook, and to my credit on the books.

On re-examination, he said that he had a brother dealing with the firm before the dissolution, and he continued to do business with the firm afterwards. I kept no separate bank account; all my money was kept in the name of the firm, and charged and credited to me on the books of the firm.

The plaintiffs also produced Walter C. Scott as a witness, who testified that he was, at the time the insurance was effected, the agent of six or seven insurance companies; no questions were asked by him as to who composed the firm; it was customary to give insurance to any one who asks for it; no one told me who composed the firm; it was customary for me to go to the office of the plaintiffs each day after supper, and enquire about insurance; I went to Bellman; he had charge of the receipts; Hamilton & Cook had nothing to do with the care of the grain; that was with the railroad company, and was so known to me when the insurance was effected.

On cross-examination, he said that he had known Hamilton & Cook ten years; I did know, from reputation, who composed the firm, and had no notice of any dissolution; I supposed they were really together as partners.

And thereupon the plaintiffs withdrew all claim to recover for grain

belonging to Vincent Hamilton and Josiah D. Cook, individually, and rested their case.

The bill of exceptions contains "all the evidence given to the jury by either of the parties in the case.'

POINTS.

I. Bailees are sometimes called agents, but not accurately. Agents act in the name, and for account, and by authority of a principal, as a clerk who sells goods, a teller who receives deposits, or a messenger who delivers parcels; and to that principal the acts of agents are imputed as his own. They have no interest in the business, unless in some cases by way of salary, and no custody. Probably no mere agent, not having a share of profits for salary, can get up an insurable interest. And a policy to such an one "on goods his own or held by him in trust or on commission, or sold and not delivered," would never attach for want of a subject at risk.

Otherwise as to a bailee: He acts in his own name and for his own account, and on his own authority, though in all this he is, in some sense, doing business for bailors. He exercises a custody and discretion which are his own. Equally his are the care and labor he bestows, the advances he makes, commissions he charges, liens he holds, responsibility he assumes. These give him rights and interests in the property itself good against all mankind, including bailors themselves; and this interest is insurable under the appropriate description "of goods in (a specified place) his own, or held by him in trust or on commission, or sold and not delivered, or (as in a very late case) sold and not removed."

Waring *v.* Indemnity F. Ins. Co., 45 N. Y., 606.
Stilwell *v.* Staples, 19 N. Y., 401.
" " 6 Duer, 63, S. C.
Lee *v.* Adsit, 37 N. Y., 78, 88.

II. This interest authorises him to treat the whole property as his own and to insure for its full value, payable to himself as in his own right. If there be no instruction, express or implied, to insure for benefit of bailors, there seems to be authority that in case of loss he may keep the whole proceeds of the policy to his own use, however much it may exceed his own charges; but if such instructions, whether by express words or by usage exist, then the policy will be for both; or, rather the bailee will receive the money and be liable to pay the bailor as he pays other creditors, the bailor seeming to have neither priority nor lien.

De Forest *v.* Fulton F. Ins. Co., 1 Hall 84.
Siter *v.* Morris, 13 Penn. 218.
Lee *v.* Howard F. Ins. Co., 11 Cush. 324.
Waters *v.* Monarch F. & L. Ins. Co., 85 E. C. L. R., 868 and cases under Point I.

III. A commission merchant or other bailee, who having such authority to insure for benefit of bailors, neglects to exercise it, becomes liable by reason of his neglect, to damages such as a real insurer would have had to pay. Though no insurer, he is responsible to the same extent as if he were such, just as a person who, being no partner, yet by holding himself out as such, gets trusted in that character, may be responsible as if he were a partner, though he must continue to be none.

Morris *v.* Scammel, 2 Wash. C.C. R., 203.
Wilkinson *v.* Coverdale, 1 Esp., 75.
Ela *v.* French, 11 N. H., 356.
Gray *v.* Murray, 3 John Ch. 167.
Soule *v.* Union Bank, 45 Barb. 111.

A bailor cannot under legal rules escape such responsibility, by making any insurance company under no liability because he failed to make a valid insurance, pay those damages for him under a policy, which through his fault never attached.

IV. In such cases it can make no difference *where* the bailee keep the goods, whether on his own premises, or in another's warehouse, a public store or railroad elevator. If he have not the actual or constructive custody he is no bailee and has no goods in trust or on commission; nor whether the goods be petroleum, cloths or grain, nor whether he be bailee for a single party or a commission merchant receiving consignments from many.

V. Partnerships among commission merchants have the same elments, joint rights to profits and joint liability for losses as among merchants of other kinds and as in all other business.

VI. A policy on the interest of two cannot be supported by proof of interest in only one. It makes no difference whether the joint interest had ceased before the policy or had never existed, or whether existing at the date of the policy, it was afterwards terminated by one, without consent of insurer, selling his interest.

Work *v.* Merchants' F. Ins. Co., 11 Cush., 271.
Graves *v.* Boston M. Ins. Co., 2 Cranch, 419.
Tate *v.* Citizens' M. Ins. Co., 13 Gray, 79.
Burgher *v.* Columbian Ins. Co., 17 Barb., 274.
Wood *v.* Rutland and A. Ins. Co., 31 Vt., 552.
Sadler's Co. *v.* Badcock, 1 Wilson, 10.
" " 2 Atk., 534, S. C.
Howard *v.* Albany Ins. Co., 3 Denio, 301.
Murdock *v.* Chenango Co. M. I. Co., 2 N. Y., 220.
Tillow *v.* Kingston M. I. Co., 5 N. Y., 405.
Catlett *v.* Pacific Ins. Co., 1 Paine, 594.
Bell *v.* Ansley, 16 East, 141.

VII. Cook alone, at the date of the policy and of the fire, *held* the grain in question in trust or on commission. He alone was the bailee.

and alone had an insurable interest. Hamilton had no custody, was no bailee, and had no insurable interest. No action, therefore, can be maintained—not a joint action, because the interest was sole, nor a sole action, because the policy was joint.

The Court below therefore erred in instructing the jury according to the plaintiff's first request, and in refusing to instruct them according to defendant's third request, which are respectively as follows:

The first instruction given:

"That if they believe that said Hamilton & Cook mentioned in the policy of insurance are Vincent Hamilton and Josiah D. Cook, the plaintiffs, and that there was in said elevator building, at the time of said fire, grain which had been placed there in the name of Hamilton & Cook, and that the owners of said grain had, either expressly or by the usages of trade, authorized said Hamilton & Cook to insure the same for their benefit, the plaintiffs are entitled to recover, for the benefit of said owners, the value of said grain at the time of said loss."

The third instruction refused:

"That if, under the proofs, they should find that the wheat held by Cook on commission was received from customers in the name of Hamilton & Cook under the circumstances stated in the agreed statement of facts, yet there can be no recovery in this action unless the same was actually held by Hamilton & Cook, jointly and upon joint account. If Hamilton simply suffered his name to be used by Cook, and had no interest in or control over the business or the property, he had no such joint interest in the property as would fall within the provisions of the policy, and could suffer no joint damage for which this action can be maintained."

VIII. There was error in that instruction as given on several other grounds:

(*a.*) Supposing the jury to have answered the three questions implied in that instruction affirmatively, the plaintiffs became mere agents without interest, to insure for the owners. No doubt such agents may effect insurance in their own name, provided the principal's property be properly described, and provided also the agency be disclosed in the policy, by using the word "agent" or "for owners," or "for whom it may concern," or the like or else explicitly naming the principal. Now the property in *this* policy is described as the plaintiffs' own or held by them in trust or on commission, and the declaration conforms. These, fit owner or bailee, but not agents merely to insure. For both these further reasons, therefore, the plaintiffs, if they were joint agents to insure, could not recover in this action. And for a third reason: The action must be and always is brought in the name of the owner, and never in that of an agent without interest. On a bailee's policy, such an agent can never recover for the benefit of owners.

(*b.*) This instruction is also erroneous, inasmuch as it directs the jury, on the hypothesis assumed, to find for plaintiffs, although they might believe from the evidence that the plaintiffs, by fraudulent concealments of their dissolution and fraudulent assertions of their partnership continuance, induced the defendant to underwrite the policy. In instructions three and four, the Court told the jury that if they believed such and such things, there would be neither fraudulent concealment nor fraudulent misrepresentation. But under the first they are told that whether they believe those things or not, provided they answer affirmatively the three questions whether the Hamilton & Cook of the policy are the plaintiffs, whether goods were in the elevator in their *name*, and whether they had authority to insure, they must find for plaintiffs, fraud or no fraud. That is fortifying agents' frauds a little too strongly, especially where, as in this case, the fraudulent party is the agent himself, and the fraud is committed in the very act of agency, thereby binding the principals with both knowledge and approval.

Authority to insure means to insure in the name of right parties on insurable interests by policies obtained by honest means.

IX. The policy was void for fraud.

A partnership had for some years existed between plaintiffs Hamil ton & Cook, grain commission merchants, but had been on the first of July 1867 clandestinely dissolved and never renewed. Hamilton, the head of the firm, possessing capital and an influential name, had privately withdrawn his care and capital and embarked both temporarily in other pursuits for his own account, using the firm name sometimes for show and Cook's accommodation, but intending to withdraw himself in person soon to California. All that remained of the firm was the shell of its reputation with nothing in it but Bellman, its old bookkeeper and Cook raising money to make advances on consignor's grain, by pledging the warehouse receipts. Cook alone was interested, and Cook, Bellman and Hamilton, and some lawyer whom they advised with how to do it, were alone in the secret of the change. In the fifth month after the dissolution the defendant, who had insured the firm while it existed, issued on the application of the bookkeeper, the policy in suit, believing the firm to exist still. Twenty-six days afterwards the fire occurred, and four days later the secret was first divulged by publishing the dissolution.

All untruth uttered with intent to deceive others for the benefit of the deceiver is *contra bonos mores*. The untruth of the continuance of this firm was kept up that Cook might profit by "the prestige" and that Hamilton might have what little he did done without commission. To speculate out of the deception was in both minds. In New York and Georgia such an use of names is a statutory misdemeanor. 3 Kent, 31 n. (a). And it is hard to say why every consignment thus obtained was not a felony in which Cook was principal and Hamilton accessory. True, they remained liable just as if they had been partners; but Hamilton himself had withdrawn whatever he had that made his name attractive. But the name remained and business continued to follow it. It increased the demand

for insurance. Had Cook been left to himself in name at he was in resources, he would have needed less; and the defendant, while it would certainly have been invited to a smaller risk, might possibly have refused altogether. This deception concerted *malo animo et causa lucri* increased risk and loss, and perhaps was at the bottom of both. A large portion of this judgmeht, if not the whole of it, had there its *fors et origo.* How then was it not fraud?

The second and third requests that were refused should have been given, and the second, third and fourth instructions given should have been refused.

The first instruction refused.

"That if the jury should find, from the evidence submitted to them, that the defendant had dealt with the plaintiffs by insuring their property while they were actually doing business together as partners, and that the policy sued upon in this action was issued to Cook after such partnership was dissolved, and Hamilton had no further interest in the business of Hamilton & Cook, and without any disclosure on his part that the partnership had been dissolved, the agent of the company supposing it still to continue, the fact that he made such application in the name of the former partnership, and conceded the fact that had previously been dissolved, and that Hamilton had no interest in the business or the property insured, is such a misrepresentation and concealment as will avoid the policy."

The second instruction refused.

"That upon the facts stated in the first request, it would make no difference that Cook continued to do the business, being alone interested therein, in the name of Hamilton & Cook, with the assent of said Hamilton, and in pursuance of an agreement with said Hamilton that it should continue to be done in the names of Hamilton & Cook, and that under such circumstances no recovery can be had in the present action."

The second instruction given.

"That if the jury find that, at the time of the making of said writing of dissolution, said Hamilton & Cook verbally agreed that said business conducted by them as partners prior to said first day of July was thereafter to be continued by said Cook in the name of Hamilton & Cook, and that said verbal contract was carried into effect, and that said contract of insurance was effected by said Cook, in the course of the prosecution of said business, upon grain which had been received by him in the name of Hamilton & Cook, under said agreement, plaintiffs are entitled to recover from defendant the value of the grain lost, for the use and benefit of the owners of said grain."

Third instruction given.

"That if the jury find that no representations were made to to defendant with regard to individuals composing the firm of Hamilton & Cock, there was no misrepresentation which can avoid said policy."

Fourth instruction given:

"That if the jury find that said Hamilton & Cook had no actual care or custody of the grain in said elevators, but that the same, so far as regarded its preservation against fire, was entirely in the control of said railroad company, and so understood by the defendant's agent when said policy and contract of insurance was executed, the omissions by plaintiffs to notify defendant of said agreement of dissolution cannot be considered a concealment which will avoid the policy."

X. In further reference to the third instruction given, it is to be observed that both in the agreed state of facts and in the testimony of Cook, Hamilton and Scott, it is stated that the plaintiffs had been partners under the name of Hamilton & Cook, and that the firm-name continued to be used by each of them from the time of the dissolution to the time of insurance, and afterwards. Each such use of that name was a representation spoken or acted that the plaintiffs still composed that firm; and if such representation was untrue and of a material matter, and since defendant's agent issued the policy believing them to be partners, still it was "a fraud" which vitiates the policy.

XI. The fourth instruction given assumes that if the goods insured were in the actual custody of others than plaintiffs, the representations and concealments touching the continuance of the firm were immaterial, as the plaintiffs could have done nothing in preventing the fire. This does not follow: If Hamilton, in addition to the name, had felt the care and exercised the natural vigilance of a partner, he might have detected the thieveries going on and prevented the destruction of the building to conceal them. But it is not alone to prevent or extinguish fires that it is material to understand whether or not one of the insured possess an insurable interest. The rule is imperative that such interest must exist. How the fact that Hamilton's withdrawal was not known operated, is shown under Point IX. This had nothing to do with his real or supposed access to the elevator.

ALVIN C. BRADLEY,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

DECEMBER TERM, 1871—NO. 150.

THE PHŒNIX INSURANCE COMPANY, Pl'tffs in Error,

vs.

VINCENT HAMILTON & JOSIAH D. COOK, Def'ts in Error.

Argument for Defts.

M. R. & R. WAITE,
P. PHILLIPS,
BISSELL & GORRILL,
Attys. for Def'ts.

Supreme Court of the United States.

DECEMBER TERM, 1871—NO. 150.

THE PHŒNIX INSURANCE COMPANY, Pl'tffs in Error,

vs.

VINCENT HAMILTON & JOSIAH D. COOK, Def'ts in Error.

Argument for Defts.

Statement.

Defendants in Error were partners as grain commission merchants. They dissolved partnership under an agreement that the dissolution should not be published, and that Cook should thereafter continue the business in the firm name for his own benefit. Said business was thereafter conducted by Cook, without change in the method of its operations, and without notice of any termination of the partnership relation. Grain was consigned to Hamilton and Cook by former correspondents of the firm, under instructions to insure. Insurance was effected with Plaintiff in Error, who executed a policy whereby it agreed to insure Hamilton and Cook in the sum of ten thousand dollars against

loss by fire, on grain in Michigan Southern Elevator "A," their own, or held by them in trust, or on commission. The contract was negotiated in the usual way, the agent of the Insurance Company making no inquiries relative to the constitution of said firm. It was understood that the grain was in the elevator of the Michigan Southern Railroad Company, and under the sole care and custody of said corporation. The building was burned during the life of the policy and payment of loss refused. Hamilton and Cook brought suit and obtained judgment. The Insurance Company institute this proceeding to procure a reversal. Record fo. 28 to 32, 45 to 50.

Plaintiff had not dealt with defendants prior to dissolution.

The first and second charges requested by Plaintiff in error were objectionable, for the reason that no evidence had been offered from which the jury could infer that it had dealt with Hamilton and Cook prior to the dissolution. Record fo. 50–51.

No insurance had been effected either with Plaintiff or the agent who issued this policy, until after said date. Fo. 45.

Both Hamilton and Cook were parties to contract of insurance.

The procurement of insurance on their customers' grain was part of the business in which Hamilton and Cook were engaged. Fo. 28–30. Story on Agency, §111.

When Hamilton agreed that Cook should continue the business in the firm name, he authorized Cook to make him a party to this contract of insurance. The Plaintiff holds him responsible for the performance of all obligations by said contract on the part of Hamilton and Cook to be performed.

Nominal partnership was created.

The agreement whereby the name and credit of Hamilton were loaned to Cook, created a partner-

ship in every matter thereafter transacted by either with others, under said firm name, and within the scope of said business. It was what the law defines a nominal partnership.

Parsons on Part., 31.

Such agreement was lawful. Every man may as properly lend his name and credit as any other thing which he owns.

Agreement for nominal partnership is lawful.

Parsons on Part., 116.

The nominal partnership once created, the right of either partner to bind the other in all matters appertaining to the business carried on in said firm name, is precisely the same as if the partnership were actual. The firm is as to all the world except the partners themselves, an actual co-partnership.

As regards third parties the law recognizes no distinction between nominal and actual partnership.

Parsons on Part., 41, 61, 115 to 119, 134, 135, 95, 413, 414.

Hamilton had an insurable interest. He would have been responsible to the owners of the grain had no insurance been effected.

Hamilton had insurable interest.

Bateman's Com. Law, §471.
Buck vs. Chesapeake Ins. Co., 1 Peters, 151.

About a third of the value had been advanced the owners. The money was obtained from the banks on Hamilton's credit. Record fo. 45, 47.

Insurance effected by Cook under the authority which Hamilton had conferred inured to Hamilton's benefit.

1 Phillips on Ins. §26.
2 Phillips on Ins. §1851.

To remove every possible objection, we at the trial withdrew our claim for the value of Hamilton and Cook's individual grain. Record fo. 50.

Policy is for whom it may concern.

Such withdrawal was not necessary. The terms of the policy show that the grain was the thing insured, without reference to the ownership. The words are equivalent to the expression "for whom it may concern."

1 Phillips on Insurance, §412, §490.
DeForest vs. Fulton Ins. Co, 1 Hall's N. Y. Sup. Ct. Rep. 84, 135.

Having relinquished said claim, we certainly are entitled to our verdict for the value of goods consigned to Hamilton and Cook under instructions to insure. Upon this point we call especial attention to the case last cited.

2 Phillips on Insurance, §1958, 1965.
Ætna Ins. Co. vs. Jackson, 16 B. Monroe's Ky. Rep. 258 to 261.
1 Phillips on Ins., §385, 660.

Suit is properly brought in name of Hamilton and Cook.

This action was commenced in the State Court, and was properly brought in the name of Hamilton as well as Cook.

2 S. & C. Ohio Stat. 953, §27.
Parsons on Part., 134, 135.
Collyer on Part., §96.

Partnership relation of Hamilton and Cook was not material to risk insured.

The Insurance Company did not expect any action from Hamilton in protecting the grain against loss by fire. The sole custody and care devolved upon the Railroad Company.

The bargain between him and Cook, whereby the latter was to have all the profits, and, as between themselves, pay all the losses, is in no way material to the risk against which Plaintiff agreed to insure.

No disclosure was required.

There was therefore no obligation on the part of Cook to disclose to Plaintiff in Error the exact nature

of the partnership relation. This silence does not come within the legal definition of a concealment.

1 Phillips on Ins., §531, 676, 571, 573, 588, 640, 660.
Parsons on Part., 414.

No misrepresentation.

For the same reason there was nothing which can be considered a misrepresentation. Plaintiff made no inquiries; nor did Defendants in Error upon this point make any statement whatever.

1 Phillips on Ins., §524, §539.

Deft's in error could not have recovered back premium paid.

The correctness of the positions assumed by this Insurance Company may be tested by the inquiry: Could Hamilton and Cook, or either of them, have maintained an action to recover back the premium paid?

The rights and obligations of these parties must be reciprocal. If the Company can not be held liable, Cook could, in case no loss had occurred, have brought suit to recover back the premium, upon the ground that nothing had been put at risk.

1 Phillips on Ins., §582, 693.
2 Phillips on Ins., §1844.

Suppose such suit brought, and proof given that the actual partnership was dissolved July 1, 1867. Could not the Company safely defend by evidence that on the same day an agreement for a nominal partnership was created? Would not this Court declare that as to them the difference between an actual and nominal partnership was an immaterial distinction?

1 Phillips on Ins., §765.

Hamilton could have made no defence in suit brought for premium.

If Plaintiff in Error is entitled to judgment, then Hamilton could have defended an action brought against him for the premium, had the policy been issued upon credit.

Could such defence be sustained? Would not the evidence appear conclusive that this policy was procured by what is equivalent to his express direction, through Cook, his agent and nominal partner?

Policy should be liberally construed.

Under the present administration of the law of insurance, the language of the policy must receive a liberal construction. The effort of the Courts is to make the contract that which the assured understood it to be; that which the assured had the right to suppose the insurer intended; a contract of indemnity. Technical defences can no longer prevail.

1 Phillips on Ins., §638, 688, 872, 669, 673, 768, 866, 124.

"Every intendment is to be made against a construction of a contract under which it would operate as a snare."

Hoffman et. al., vs. Ætna Ins. Co., 32 N. Y. Rep., 405. A policy upon a fluctuating stock of goods issued to a firm; one of the partners sold his interest to the others and retired. The policy provided for forfeiture in case of sale. The Court of Appeals in substance decided, that a policy issued to a firm, in the firm name, affords no presumption that the particular members composing the partnership are by the insurer taken into consideration in estimating the risk. The Judges further held that the proviso against sales had no reference to changes of interest among the partners themselves. It therefore followed that goods bought by the continuing members, after the retirement of the other, (in other words, by the new firm) were covered by the policy. Much of the reasoning in Judge Porter's opinion appears to us applicable to the case now under consideration.

Ætna Ins. Co. vs. Jackson, 16 B. Monroe's Rep. 273.
Mackie vs. Pleasants, 2 Binn. 373.
Pelley vs. Royal Ex. Ins. Co., 1 Burr, 349.

Public interest.

It is for the public advantage that the commodities of commerce be concentrated at suitable points for distribution. For this end the owners must have confidence that while their property is in the hands of the factor, it will by insurance be protected from loss. To effect this object general expressions, like those in the policy under consideration, have been introduced. These, surely, will be "largely" construed.

Recapitulation.

We restate our position. Mr. Bellman and Mr. Scott, in behalf of their respective principals, negotiated a contract whereby, in consideration of the payment of money procured upon Hamilton and Cook's credit, certain grain held by the warehouseman in Hamilton and Cook's name was agreed to be insured. The names of the owners of that grain, or the names of the individuals doing business under the designation of Hamilton and Cook, or their private bargains relative to profit and loss, were in no way taken into consideration. This claim by Plaintiff that in consequence of the agreement of the previous July it is absolved from liability, is an attempt to repudiate an honest debt by resort to mere technicality.

Penalty demanded.

The authorities hereinbefore mentioned were cited in the Circuit Court. After its judgment the sole object sought by the institution of this proceeding appears to us the procurement of delay. We ask for judgment of affirmance, with interest, and the highest damages the rules of this Court allow.

M. R. & R. WAITE,
P. PHILLIPS,
BISSELL & GORRILL,
Attys. for D'f'ts.